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IN THE

Supreme Court of the United States

October Term, 1995

HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRET, ERNEST R. PROCALO, RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II,

Joint Petitioners

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does requiring the filing of a second Notice of Appeal by Class Members appealing the denial of their request for intervention, if they were to avoid losing their right to review of the trial court's class decertification and other orders specifically set out in their duly filed initial Notice of Appeal and motion in the Ninth Circuit, conflict with FRAP 3 and 4, and the sufficiency of the "notice afforded" holdings of this Court?

2. Does the decertification of an FRCP 23 multi-state class three months prior to trial by a California federal district court on manageability grounds, due to differences in some class members' residence states' laws with those of California, conflict with the constitutional application of one state's laws in multi-state class actions approved in Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988) and Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822-23 (1985), where the other states' laws do not mandate a result different than would be obtainable in the state in question?

3. During the pendency of former Class Members' appeal of the rejection of their request for intervention and the decertification of the Class, may a trial court vacate stipulations and three partial summary judgment rulings in the former Class Members' favor while entering a stipulated dismissal of the former class representative's case, when those appealing Class Members were no longer before the trial court, without violating Due Process and running afoul of U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, ___ U.S. _____, 115 S.Ct. 386, 392-93 (1994)?

4. Can intervenors, whose rights were established as a matter of law by the granting of three partial summary judgments in their favor while Class Members, be denied intervention under Federal Rule of Civil Procedure 24(a) after the class was decertified on manageability grounds, if requiring each of them to file their own separate suit would as a practical matter impede their enforcement of those rights?

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JOINT PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Memorandum of the Ninth Circuit Court of Appeals filed January 19, 1996, and the Order of the Ninth Circuit filed March 6, 1996, denying the petition for rehearing and rejecting the suggestion for rehearing en banc, were not

published, but are reproduced in Appendix A to this Petition at pages A-1 and A-3, respectively. The underlying Joint Notice of Appeal filed June 7, 1994, and the Joint Appellants' FRAP 27 Motion to Expand Review of Trial Court's Orders filed October 14, 1994, are reproduced in Appendix B at B-1 and B-5, respectively.

JURISDICTIONAL STATEMENT

The Memorandum and Judgment of the Ninth Circuit Court of Appeals was entered on January 19, 1996. The Order of the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed March 6, 1996. This Joint Petition for a Writ of Certiorari was filed within ninety (90) days of the date of the denial of that motion for rehearing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND COURT RULES
United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Appellate Procedure

Rule 3 (See Appendix D-1)

Rule 4 (See Appendix D-2)

Rule 27 (See Appendix D-6)

Federal Rules of Civil Procedure

Rule 23 (See Appendix D-6)

Rule 24 (See Appendix D-11)

STATEMENT OF THE CASE

Federal Jurisdiction

At the time the Complaint against Becton, Dickinson & Company (hereinafter "BD") was filed in August, 1988, and when the class was initially certified in June, 1990, federal question and diversity jurisdiction attached in the District Court by virtue of 28 U.S.C. §§ 1331, 1332 and 1367, and 18 U.S.C. § 1961.

The Ninth Circuit Court of Appeals obtained jurisdiction with the filing of the Notice of Joint Appeal on June 7, 1994, and with the October 14, 1994 filing of the FRAP 27 Motion to Expand Review of the Trial Court's Orders, pursuant to 28 U.S.C. § 1291, pendent appellate jurisdiction, and FRAP 3 and 4.

Factual Background

BD, one of the largest if not the largest medical supply corporation in the world, has its principal place of business in New Jersey. (CR 429 at 2.) During 1978 - 1981 BD's B-D Division divided the country into 12 sales regions, with 6 of those regions, encompassing 32 states, being managed by a Western Area Sales Manager headquartered in California. (CR 166 at 2; CR 429 at 2-3.) David M. Koepke, the former class representative, the Joint Petitioners here, and Michael E. Lillig, were amongst the approximately 200 field sales representatives (hereafter "FSReps") nationwide in BD's B-D Division during 1978 - 1981. Mr. Koepke, along with Mr. Lillig and petitioners Dunmeyer, Jackson, Karch, Kentala, and Perret were in Region 9, while petitioners Furuta, Johnson, and Procalo were in Region 5. The headquarters for both Regions 5 and 9 were located in the state of California. (CR 166 at 2.)

In order to encourage its FSReps in the years 1978 - 1981 to expend extra efforts beyond those necessary to earn their base monthly salary, BD management mailed each FSRep, nationally, incentive compensation plans ("Plans"), and promised to pay the FSReps a year-end bonus pursuant to the mathematical calculation (CR 30 at Exh. C-1) in these Plans, specifically "4.5%" of regional and national bonus pools that would "accrue" for their benefit, once prior year

sales figures and national predicted sales figures ("Budget") were exceeded (CR 662 at Exh. 13, ¶ 2.2, 2.4; CR 657 at Exhs. 51, 52, 56 at ¶ 2a, 4). According to BD management personnel, that "4.5%" specifically described in the Plan to be paid into the "accrued" FSRep pools "was never reduced" (CR 769 at 53), and was "constant . . . A fixed percentage." (CR 663 at Exh. 73, pp. 4-5 ¶¶ 17(a), 18(b)). Completely separate management incentive compensation plans were mailed out at the same time to the district, regional and area sales managers, although the FSReps were never apprised of the terms of those plans other than being told that management bonuses were paid out of a totally different pool than the FSRep's bonus pool. (CR 620 at 11; CR 769 at 29-31; CR 646 at 11.)

In 1978-1981, contrary to what BD promised its FSRep's, and unbeknownst to the FSReps, BD wrongfully took monies out of all the accrued FSReps bonus pools, converted funds from those pools, and used those monies to pay management bonuses, knowing all the while management was not eligible for monies from those FSRep pools (CR 333/RT at 13-15; CR 659 at 113-15; CR 657 at Exhs. 61, 65; CR 658 at Exh. 94; CR 662 at Exh. 44), and saving the corporation hundreds of thousands of dollars. BD continually refused to acknowledge its obligations to its FSReps even though the enforceability of the Plan and

breach of the Plan were established as a matter of law in a Washington state court action (reported at Lillig v. Becton Dickinson, 105 Wn.2d 653, 717 P.2d 1371 (1986)) in 1981, and again in this matter in 1989 and 1990. (CR 30 at Exh. C-1; CR 290 at Exh. 1, Instr. 9; Appendix C-1, C-5) The FSRep's were never told (1) their "accrued" pools had been depleted to pay management bonuses, (2) that they had been paid less than what they were owed, nor (3) that they had not been paid the specific amount of their "accrued" pool that BD itself had calculated they had earned. (CR 685, Exh. 2 at pp. 172-73.)

To mask its covert skimming of the FSReps "accrued" pools, BD warned its FSReps not to discuss their individual sales figures or bonuses with other FSReps (CR 791), and made certain it alone had access to and sole control of all of the information and sales figures necessary to utilize the Plans' mathematically calculated compensation formulas. (CR 659 at 66; CR 661 at 27; CR 568 at 8-11, 19.) Then, even when an FSRep on occasion risked reprimand and asked how the year-end bonus figure was arrived at, BD management flippantly responded vaguely that the lower than anticipated number was due to "something in the taxes," (CR 646 at 18-21) or again warned of stern consequences if too many questions were asked. (CR 634 at 25-26.)

Procedural Background

In August 1988, after having learned in 1987 of BD's wrongful acts, Mr. Koepke filed his federal question (RICO) and diversity class action. The initial certification of the class occurred in June 1990. (CR 879/RT at 10-12; CR 161.) Following an assessment of over $27,000 in terms against BD for discovery abuses (CR 211 at 1, 3), additional orders were entered modifying and expanding the class in 1991 to proceed on a national basis (CR 220; CR 251).[1] Partial summary judgments entered against BD established under California law that the 1979 Plan was an enforceable contract, that it was breached by BD, and that BD was guilty of conversion when it took "accrued" funds from the FSReps pool to pay management bonuses (See Appendix C-1, C-5, C-13). Trial was eventually scheduled to commence December 6, 1993 (CR 499). The class was ultimately decertified (Appendix C-16), with the trial court refusing to reconsider its decision (Appendix C-18), and refusing to recertify any proposed alternative class (Appendix C-22). The petitioners Dunmeyer, Furuta, Jackson, Johnson, Karch,

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[1] The complaint setting out the assertions of the certified national class contained the 200 FSReps claims for damages arising out of BD's breach of contract, negligence, breach of the covenant of good faith and fair dealing, RICO violations, bad faith denial of the existence of a contract, breach of fiduciary duty, labor code violations, conversion, fraudulent inducement, and fraud. (CR 242)

Kentala, Perrett and Procalo's (hereinafter "the Dunmeyer petitioners") motions to intervene were denied on May 11, 1994 (Appendix C-25).

On June 7, 1994, the Dunmeyer petitioners requested that the Ninth Circuit (a) review the May 11, 1994 order denying their motions to intervene, and (b) review five other specific orders (entered August 18, 1993, September 20, 1993 and January 18, 1994) pertaining to the class they had been members of before its decertification. All those specific orders were listed in the June 7, 1994 Notice of Joint Appeal. See Appendix B-1. On that same day, and in the same Notice of Joint Appeal, petitioners Forster, Jones, Oravetz, Peckels, White, Williams and Zucht (hereinafter "the Forster petitioners"), jointly appealed a) the May 11, 1994 denial of their request to be designated class representatives for the purposes of appealing the rulings adverse to the class, and b) those same five adverse rulings pertaining to the class.

On September 16, 1994, Commissioner Shaw of the Ninth Circuit granted BD's Motion to Dismiss Appeals from the August 18, 1993, September 20, 1993, and January 18, 1994 trial court orders. See Appendix A-11. The Dunmeyer and Forster petitioners were allowed, however, to pursue their respective appeals of the trial court's May 11, 1994 orders before the Ninth Circuit.

On October 14, 1994, 21 days after former class representative Koepke's settlement and the trial court's dismissal of his action on September 23, 1994, the Dunmeyer and Forster joint petitioners, pursuant to FRAP 27, served and filed their Motion to Expand Review of the Trial Court's Orders in the Ninth Circuit to reinstate review of the August 18, 1993, September 20, 1993, and January 18, 1994 Orders dismissed by Commissioner Shaw, and in addition requested review of the September 23, 1994 trial court order entered post-appeal, and in their and their counsel's absence (Appendix C-30, C-35, C-37), that vacated stipulations and partial summary judgment orders in their favor relied upon in their appeals. All of those orders were specifically listed in that October 14, 1994 motion, with the particular relief sought requesting the Ninth Circuit "to include" in its review each one of those orders. See Appendix B-9. The Ninth Circuit denied that Motion to Expand Review without prejudice on December 21, 1994, with leave to renew that motion in the opening brief. See Appendix A-10.

On January 19, 1996, the Ninth Circuit affirmed the trial court's denial of the Dunmeyer intervenors' motion for intervention and its refusal to designate the Forster intervenors class representatives for the purposes of appeal. See Appendix A-3. The Court did not rule on the Dunmeyer

and Forster intervenors' renewed motion for expanded review (See Brief of Joint Appellants, filed in the Ninth Circuit May 9, 1995, at p. 19-21), yet ruled it did not have jurisdiction to consider the other orders specifically listed in the June 1994 Notice of Joint Appeal and the October 1994 FRAP 27 Motion to the Ninth Circuit. On March 6, 1996, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing en banc. See Appendix A-1.

REASON FOR GRANTING THE WRIT

I. Appellate Review Should Include All Orders Where Review Requested

First, it was the intention of Congress (28 U.S.C. § 2072) and this Court in promulgating the Federal Rules of Appellate Procedure ("FRAP") to set out an integrated set of rules that would be uniformly applied throughout the circuits. Interpreting or applying these rules so as to give effect to some but not to others, or applying them inconsistently, jeopardizes the predictable, harmonious operation of eleven circuit courts anticipated by this Court.

Second, substance, not form, is the central focus of an appeal under the FRAP from rulings of a federal district court. With specific regard to FRAP 3, this Court has ruled that "[c]ourts will," not may at their discretion, construe the requirements of Rule 3 "liberally." Smith v. Barry, 502

U.S. 244, 248, 112 S. Ct. 678, 681 (1992).

A notice of appeal under Rules 3 and 4, as promulgated by this Court, serves the straightforward function of giving notice to an opposing party, within a specific time frame, of "the party or parties taking the appeal," the particular "judgment, order or part thereof appealed from," and specifically designates "the court to which the appeal is taken." Smith v. Barry, supra at 247-48, 112 S. Ct. at 681. Any document or "paper" that serves that function within that set time frame satisfies FRAP 3 and 4 (Smith v. Barry, supra at 248-49, 112 S. Ct. 682). It is for this reason that "the notice afforded by the document" meeting those qualifications, bringing the specified parties before the court, satisfies FRAP 3 and 4 (Smith v. Barry, supra at 248-49, 112 S. Ct. at 682), whether that document was filed by a pro se plaintiff or a large corporation, and whether or not that notice was "a premature notice" that ripened, or was filed after a single final judgment. See FirsTier Mortgage Company v. Investors Mortgage Insurance Company, 498 U.S. 269, 275-77, 111 S. Ct. 648, 652-53 (1991). So long as "the notice afforded" by the document in question is sufficient to notify the opposing party of the orders to be reviewed and cannot be said to "catch the appellee by surprise" this Court has held that "[l]ittle would be accomplished by prohibiting the court of

appeals from reaching the merits of such an appeal." FirsTier Mortgage Company v. Investors Mortgage Insurance Company, supra at 276, 111 S. Ct. at 653.

Here, all trial court orders as to the Dunmeyer petitioners were "final" under 28 U.S.C. § 1291, including orders adverse to the class they had been members in, once their motions to intervene were denied (Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519, 524, 67 S. Ct. 1387, 1390 (1947); D. Knibb, Federal Court of Appeals Manual, § 16.2 at 187 (2d Ed. 1990) ("unsuccessful intervenors" are entitled "to file a protective appeal from any decision they would have appealed if they had been allowed to intervene") (emphasis added)). All of those orders, accordingly, were properly appealable under 28 U.S.C. §1291.

Putting aside, then, the fact that all the orders appealed here were "final" as to the Dunmeyer petitioners, even if some of the orders the Forster petitioners requested review of were deemed interlocutory as to them until the September 23, 1994 dismissal of the underlying case, even then the Ninth Court had "pendent jurisdiction" over those other issues, since the Forster petitioners were already before it appealing the May 11, 1994 order. See, McCowan v. Sears Roebuck & Co., 908 F.2d 1099, 1104 (2d Cir. 1990); Stewart v. Baldwin County Board of Education, 908

F.2d 1499, 1509 (11th Cir. 1990).

Ignoring the fact that both the Dunmeyer and Forster petitioners were already before the court, and neglecting to note the October 14, 1994 FRAP 27 motion to expand review requested precisely the same relief, i.e., that the Ninth Circuit review specifically designated trial court orders (Compare Appendix B-2-3 to Appendix B-9), that was requested in the June 1994 Notice of Joint Appeal (excepting only the addition of the September 1994 post-appeal vacatur order), the Ninth Circuit required that a second Notice of Appeal be filed by both the Dunmeyer and the Forster petitioners. Such redundancy is not necessary to meet the requirements of FRAP 3 and 4, and cannot be grounds for failing to reach all the merits of their appeal.

The Dunmeyer petitioners were before the Ninth Circuit on October 14, 1994. The Forster petitioners were before the Ninth Circuit on October 14, 1994. There was no need to bring these parties, already before the Ninth Circuit, to the Ninth Circuit through a second notice of appeal (See Calcasieu Marine National Bank v. Grant, 943 F.2d 1453, 1457 (5th Cir. 1991) (ripening of initial notice of appeal "does not require the filing of a second notice of appeal"), nor was there ever any "surprise" or prejudice to BD.

If through an FRAP 27 motion, a Ninth Circuit Commissioner had the jurisdiction and authority to dismiss

appeals from certain lower court orders, the Ninth Circuit had both the jurisdiction and the authority to (1) reinstate review of exactly those same orders the Ninth Circuit Commissioner had dismissed, and (2) to include the review of an order, attached to the moving papers, entered by the trial court after review had commenced. Reading FRAP 3, 4 and 27 together, along with Railroad Trainmen, Smith v. Barry, and FirsTier Mortgage, no rational conclusion remains except having the Ninth Circuit proceed to consider the merits of issues on review on each of the specific trial court orders designated in the June 1994 Notice of Joint Appeal and the FRAP 27 October 1994 motion.

Under 28 U.S.C. §2072, this Court is the entity to define and describe the operation of the FRAP so as to maintain its goals. The proclivity of a circuit court to deal with cases before it in a manner incongruous with this Court's goals, whether or not the circuit court publishes those incompatible rulings each time (See Transamerican Freight Lines v. Brada Miller Freight Systems, 423 U.S. 28, 34, 96 S. Ct. 229, 232, (1975)) should be dealt with by this Court by granting this joint petition for a Writ of Certiorari. The joint petitioners respectfully submit the goal of the uniform, predictable operation of the circuits requires it.

II. Application of California Law to Multi-State FRCP 23 Class Constitutional and Proper

After ruling numerous times that application of California law to claims of the class was proper,[2] and upholding the application of California law to a 10-state area comprising BD's Region 9, the trial court, barely three months to trial, held in August, 1993, that California law would no longer apply to the class, thereby making the class unmanageable, and resulting in a decertification order. That ruling, contrary to Sun Oil Co. v. Wortman, 486 U.S. 717, 108 S.Ct. 2117 (1988), and Phillips Petroleum Company v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985), eviscerating FRCP 23, was legally erroneous, led to decertification which was an abuse of discretion, and cannot be allowed to stand if multi-state classes under Rule 23 are to maintain any viability against recurring "other states' laws" arguments.

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[2]See CR 879/RT at 5 when the court stated at the time the Class was certified in June 1990, "I'm not concerned about the conflict of law issue raised by the defense at all." See also CR 333/RT at 5 where court applied California law when it granted the Class' June 1991 partial summary judgment on breach of contract and conversion. The court indeed ruled on March 25, 1994 (CR 815/RT 6-7), seven months after the decertification, that it would not overturn its June 1991 summary judgment order in the Class' favor that applied California contract and tort law to the ten state area comprising Region 9 due to there having been "full briefing and oral argument" at that June 1991 hearing, and that the June 1991 court's order itself was "based on substantive factual and legal issues, was independently reached based on an analysis of the evidence. . ."

The basis of the trial court's decertification ruling was BD's argument that there were differences between California law and the laws of the thirty-three states where the class members lived. A Rule 23 federal court multi-state class, however, does not vaporize merely because differences in state laws exist. Instead, those differences must mandate a result different than that obtainable under the law of the state whose laws the Class wishes be enforced, or the Rule 23 multi-state class should proceed.[3]

As recognized by Professor Leflar:

> '[F]alse conflict' really means 'no conflict of laws.' If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them.

R. Leflar, American Conflicts Law, § 93, p. 188 (3rd Ed. 1977); Comment, False Conflicts, 55 Cal. L. Rev. 74, 76-77, 110-112 (1967).

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[3] As recognized by this Court in Phillips Petroleum Company v. Shutts, 472 U.S. 797, 816, 105 S. Ct. 2965, 2976 (1985) "There can be no injury" in applying one state's law in a class action "if it is not in conflict" with other states' laws. Before there will be such a "conflict" there must be "material" differences which, just as "material facts" under Rule 56, must be of such a level to mandate a result. E.g. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (Under Rule 56, "material" facts offered by the non-moving party, if believed, would mandate a different result for that non-moving party."

Here, just as in the Shutts case on remand[4], when even the states that were alleged to have "material" differences "would produce the same decision" by, for instance, applying "equitable principals", there is only a "false conflict" and the Rule 23 multi-state class must proceed. [5]

Listing defense verdicts on cases distinguishable on their facts from a number of jurisdictions, with no policy examination, or merely raising the spector of some class members residing outside the forum, cannot neutralize the

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[4] Shutts v. Phillips Petroleum Company, 240 Kan. 764, 732 P.2d 1286, 1312-13 (1987), cert. denied 487 U.S. 1223, 108 S. Ct. 2883 (1988).

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[5] The class cited numerous cases to the trial court showing that the class members' residence states would not mandate a different result and would still allow recovery under legal or "equitable principals." See CR 111 at 9-14; CR 393 at 33-46; CR 683 at 19-20; CR 697 at 20-29; CR 718 at Appendix.

application of FRCP 23.[6] Any contrary ruling would result in FRCP 23 being completely ineffective anytime a class' membership spreads beyond one state's boundaries.[7]

With the growing tendency of defendants in multi-state class actions to raise precisely the same "other states' laws" argument raised by BD here, the joint petitioners respectfully submit it is imperative for this Court to grant their request for a Writ of Certiorari to assure consistent

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[6] For cases rejecting near mirror image arguments to BD's 'laws of thirty-three states' argument, see, e.g., Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. 51, 58 (S.D.N.Y. 1993); In re Crazy Eddie Securities Litigation, 135 F.R.D. 39, 41 (E.D.N.Y. 1991); Sollenbarger v. Mountain States Teleph. & Teleg. Co., 121 F.R.D. 417, 427-28 (D.N.M. 1988); Gruber v. Price Waterhouse, 117 F.R.D. 75, 81-82 (E.D. Pa. 1987); Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1982), cert. denied 464 U.S. 822, 104 S. Ct. 89 (1983); In Re Pizza Time Theaters Securities Litigation, 112 F.R.D. 15 (N.D. Cal. 1986); In Re Seagate Technologies Securities Litigation, 115 F.R.D. 264 (N.D. Cal. 1987); Roberts v. Heim, 670 F.Supp. 1466 (N.D. Cal. 1987); In Re MDC Holdings Securities Litigation, 754 F.Supp. 785 (S.D. Cal. 1990). See also, Allstate Insurance Company v. Hague, 449 U.S. 302, 315, 101 S. Ct. 633, 641 (1981).

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[7] With more class members living in California than any other state (CR 539, Exhibits 1, 2), and BD having two regional offices and a Western Area headquarters managing thirty-two states located in California (CR 166 ¶4; CR 429 ¶5), more than enough significant contacts existed to permit application of California law where the other states' laws did not mandate a result different than that obtainable in California.

results, and to keep FRCP 23 from becoming a nullity in multi-state diversity class actions.

III. Permitting Vacatur of Adverse Judgments Perverts Judicial Decisions Into Negotiable Commodities

During the course of this litigation, BD was forced to stipulate to critical points, and/or was forced to bear the brunt of four partial summary judgments against it, establishing (1) that its 1979 Plan was enforceable, (2) that the Plan was breached by BD, (3) that BD converted the FSReps funds when it "skimmed" money from the "accrued" FSReps pools to pay management bonuses, and (4) that BD should have paid the specific bonus amount calculated under the "mathematical calculations" set out in the Plan. See Appendix C-1, C-5, C-13, C-33. In fact, the summary judgments establishing enforceability of the Plan, breach of the Plan, and conversion of the "accrued" FSReps' monies pertained to all class members in Region 9 for 1979, including, amongst others, petitioners Dunmeyer, Jackson, Karch, Kentala and Perret.

Despite the denial of BD's motion in March 1994 to be relieved from both its prior stipulations and the effect of prior adverse court orders (CR 815/RT at 4-7), when it reached a settlement with former class representative Koepke following the appeal by the Dunmeyer petitioners of their

motions to intervene, BD was able, in the absence of both the Dunmeyer petitioners and their counsel (See Appendix C-30, C-35, C-37), to convince the trial court on September 23, 1994, to vacate all prior stipulations and adverse court orders in the Dunmeyer petitioners' favor. See Appendix C-39. Such a ruling, made in the absence of the Dunmeyer petitioners and their counsel, while they were before the Ninth Circuit on appeal, violates the Due Process Clause of the Fifth Amendment, and runs contrary to rulings of this Court, and to rulings of the Eighth Circuit and Sixth Circuit.

As noted by this Court, the filing of a notice of appeal

> confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Company, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982). Accord, Ulrich, Thompson and Kessler, Federal Appellate Practice Guide - Ninth Circuit, §5.38 at page 5-52 (1994) ("filing of a notice of appeal from an appealable order or judgment divests the District Court of jurisdiction of any matter which is the subject of the appeal"). See also Liddell v. Board of Education of City of St. Louis, 73 F.3d 819, 822-23 (8th Cir. 1996); Fort Gratiot v. Michigan Dept. of Natural Resources, 71 F.3d 1197, 1203 (6th Cir. 1995).

The fact that petitioners Dunmeyer, Jackson, Karch, Kentala and Perret obtained specific legal rights upon the granting of the partial summary judgments of December 6, 1989, January 25, 1990 and June 18, 1991 (Appendix C-1, C-5, C-13), specifically dealing with their relationship as Region 9 FSReps with BD, is in no way diminished by BD's settlement with the former class representative while they were on appeal before the Ninth Circuit.

In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, ___ U.S. ___, 115 S. Ct. 386 (1994), a unanimous Court stated that regardless "that the settlement agreement provides for vacatur," a settling party (like BD) attempting to escape the effects of adverse judgments against it may not seek the "equitable entitlement to the extraordinary remedy of vacatur," noted that "judicial precedents. . .are not merely the property of private litigants," and held the effort to vacate judgments before it must be denied. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra, 115 S. Ct. at 392-94. Accord, Benavides v. Jackson National Life Insurance Co., 820 F. Supp. 1284, 1288-89 (D. Colo. 1993) (court rejects efforts of large commercial "repeat litigator" to vacate adverse judgment noting such efforts amounted to "'perverting' the judicial decision into a negotiable commodity," and if permitted would allow "wealthy litigants to become, in

effect, editors of their own treatises on the subjects which concern them").

Here, just as in Benavides and U.S. Bancorp, BD improperly attempted to "rewrite" judicial precedent and to force any future litigants through the same hoops it had forced Region 9 FSReps Michael Lillig and David Koepke through, only to come down after years of stonewalling discovery and tedious motions to the same result in Koepke as in Lillig -- a literal admitted liability case where the only question left for trial for this economic megalith opposed by individual salespeople was how much it would have to pay for its wrongful acts, not if it would have to pay. The stipulations BD was forced to enter into, and the legal rulings of enforceability, breach of contract and conversion built upon those stipulations and evidence discovered are not to be bartered and sold.

The legal rights emanating from those three summary judgment rulings in their favor formed a major part of petitioners Dunmeyer, Jackson, Karch, Kentala and Perret's claims to be legally entitled to intervene. Neither those rights, the trial court's adverse rulings against BD, nor the joint petitioners' authorized efforts "to protect" the interests of the decertified class (United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S. Ct. 2464 (1977)), are items that can be negotiated away by a settling party like BD who "picks off"

the former class representative. Cf. Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 1174 (1980). As recognized by the Benavides court, "judicial decisions are not for sale." Benavides v. Jackson National Life Insurance Company, supra at 1289.

Interests in promoting settlement or clearing a court's calendar cannot override Due Process under the Fifth Amendment, nor the interest of this Court and the federal judiciary in maintaining the integrity of the federal judicial process. Allowing a "repeat litigator", like BD, to continue to drag out an ultimately admitted liability case, even in light of being hit with sanctions of over $27,000 in its attempts to prevent its own documents proving the case against it from disclosure (See CR 211), perverts federal judicial rulings into negotiable commodities, and should not be condoned by this Court. Granting this Writ for Certiorari and setting out standards for the protection of former class members and others while on appeal furthers this Court's important goal of safeguarding the foundations of the federal judiciary.

IV. Intervention Prevents Impeding Enforcement of Rights and Conserves Judicial and Litigants' Resources

Only two parts of the four-part FRCP 24(a) test were at issue in this matter, specifically the "impair or impede" and adequate representation parts. Disregarding the

disjunctive "impair or impede" language in Rule 24, the Ninth Circuit improperly focused solely on "impair", requiring the Dunmeyer petitioners to each file their own separate action, thereby placing the Ninth Circuit in direct conflict with the Fifth Circuit, and with the District of Columbia Circuit's "judicial efficiency" standards for Rule 24(a) motions.

The inclusion of the disjunctive "impair or impede" language in Rule 24, joint petitioners contend, evidences a clear intent on the part of the drafters to make Rule 24 extremely flexible. See Cascade Natural Gas Corporation v. El Paso Natural Gas Company, 386 U.S. 129, 134, 87 S. Ct. 932, 936 (1967) ("elasticity was injected" into Rule 24(a) when it was amended). Assuming that the specific words "or impede" were added to Rule 24 for a reason, as we must, it should be noted that courts defined the parameters of the term "impede" well before that term was added to Rule 24(a). See, e.g., New York Cent. R.R. Co. v. General Motors Corp., 182 F.Supp. 273, 286 (N.D. Ohio 1960) ("impede is not synonymous with 'obstruct'" but includes making something "inconvenient"); Richards v. State, 63 Ga.App. 290, 11 S.E.2d 49, 50 (1940) ("'impede' does not necessarily mean to 'stop.' It may mean to hinder, to retard, to delay, or to hamper."); Erie R.R. Co. v. Board of Pub. Util. Comm'rs, 89 N.J.L. 57, 98 A. 13, 19 (N.J. 1916)

(noting impede was "synonymous with check; hinder; delay," court rejected assertion "impede" meant "to unreasonably obstruct" as being "too narrow"); Keeler v. Green, 21 N.J. Eq. 27, 30 (6 C.E. Green) (N.J. Ch. 1870) (Court rejected argument that "impedes" meant "obstructed", ruling impedes instead meant "made a little more inconvenient").

In specifically rejecting the precise argument posed by BD here and adopted by the Ninth Circuit, the Fifth Circuit in Diaz v. Southern Drilling Corporation, 427 F.2d 1118, 1125 (5th Cir. 1970), cert. denied 400 U.S. 878, 91 S. Ct. 118 (1970), declined to adopt the position of the party opposing intervention that the would be intervener "could simply file an independent suit," found it would "impede" the intervenor's protection of its rights "as a practical matter" under Rule 24 if intervention was not allowed, and held:

> The [intervenor], we recognize, could simply file an independent suit once the winners of the present action were determined. The soundness of this premise, however, is no guarantee against sophistry in the conclusion.

Similarly, in adopting a "judicial efficiency" standard, the District of Columbia Circuit has described the focus of Rule 24 to be that of "disposing of law suits by involving as many apparently concerned persons as is compatible with

efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Circuit 1967). Accord Natural Resources Defense Council v. Costle, 561 F.2d 904, 909-11 (D.C. Circuit 1977).

Permitting one Circuit Court to proceed to interpret the "impede" disjunctive language out of Rule 24, thereby encouraging the same burgeoning of litigation in general that has prompted many to consider forming an entirely new circuit court of appeals, flies in the face of this Court's and the Federal Rules of Civil Procedure's goals of a "just, speedy, and inexpensive determination of every action." FRCP 1. As neither the Ninth Circuit's opinion here nor its opinion in Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977), comports with this Court's flexible reading of Rule 24, nor the Fifth Circuit nor District of Columbia Circuit's resolution of the same or similar questions pertaining to the impeding of the enforcement of a party's rights, this Court, petitioners respectfully submit, should grant the request for a Writ of Certiorari on this issue.

CONCLUSION

For the reasons stated, joint petitioners request that the Court grant a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted this 31st day of May, 1996,

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(Counsel of Record)

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Williams, Zucht

APPENDIX

A-1 Order of Ninth Circuit (3/6/96)

A-3 Memorandum of Ninth Circuit (1/19/96)

A-10 Order of Ninth Circuit (12/21/94)

A-11 Order of Ninth Circuit Commissioner (9/16/94)

B-1 Notice of Joint Appeal (6/7/94)

B-5 Joint Appellants' Motion to Expand Review of Trial Court's Orders (10/14/94)

C-1 Stipulated Order Granting Motion for Partial Summary Judgment as Amended (12/6/89)

C-5 Stipulated Order Granting Motion for Partial Summary Judgment (1/25/90)

C-13 Order After Hearing of Eastern District of California (6/18/91)

C-16 Order After Hearing of Eastern District of California (8/18/93)

C-18 Order After Hearing of Eastern District of California (9/20/93)

C-22 Order After Hearing Order Continuing Status Conference (1/18/94)

C-25 Memorandum of Decision and Order After Hearing (5/11/94)

C-30 Representation Statement of Counsel for Joint Appellants

C-33 Order After Hearing of Eastern District of California (8/15/94)

C-35 Motion for Entry of Order of Vacatur and Dismissal (9/22/94)

C-37 Proof of Personal Service of Eastern District of California for filing of Notice for Entry of Order of Vacatur and Dismissal; Defendant's Memorandum in Support of Motion for Entry of Order of Vacatur and Dismissal and Order (9/22/94)

C-39 Order of Eastern District of California (9/22/94)

D-1 FRAP 3

D-2 FRAP 4

D-6 FRAP 27

D-6 FRCP 23

D-11 FRCP 24

NOT FOR PUBLICATION

[FILED 3/6/1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID M. KOEPKE, Plaintiff, and RICHARD A. FORSTER; GARY C. JONES; RAYMOND A. ORAVETZ; ROBERT M. PECKELS; JERE C. WHITE; JAMES D. WILLIAMS; JOSEPH B. ZUCHT, II, Intervenors-Appellants, KERRY T. FURATA; GARY L. JOHNSON; ERNEST R. PROCALO; JULIE ENDER JACKSON; TERRY B. KARCH; DAVID K. KENTALA; BRUCE A. PERRET; HERBERT W. DUNMEYER, Plaintiffs-Invervenors-Appellants, -vs- BECTON, DICKINSON AND COMPANY, Defendant-Appellee.	No. 94-16153 D.C. No. CV-88-01084-EJG ORDER

Before: WALLACE, Chief Judge, THOMPSON, Circuit Judg and THOMPSON,* District Judge.

* Honorable Gordon Thompson, Jr., United States District Judg Southern District of California, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

BEST AVAILA

NOT FOR PUBLICATION

[FILED 1/19/1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID M. KOEPKE,	)	No. 94-16153
	)	
Plaintiff,	)	D.C. No.
	)	CV-88-01084-EJG
and	)	
	)	
RICHARD A. FORSTER; GARY C. JONES; RAYMOND A. ORAVETZ; ROBERT M. PECKELS; JERE C. WHITE; JAMES D. WILLIAMS; JOSEPH B. ZUCHT, II,	)	
	)	
Intervenors-Appellants,	)	
	)	
KERRY T. FURATA; GARY L. JOHNSON; ERNEST R. PROCALO; JULIE ENDER JACKSON; TERRY B. KARCH; DAVID K. KENTALA; BRUCE A. PERRET; HERBERT W. DUNMEYER,	)	
	)	
Plaintiffs-Invervenors-Appellants,	)	
	)	
-vs-	)	
	)	
BECTON, DICKINSON AND COMPANY,	)	MEMORANDUM
	)	
Defendant-Appellee.	)	

BLE COPY

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding
Argued and Submitted December 5, 1995
San Francisco, California

Before: WALLACE, Chief Judge, THOMPSON, Circuit Judg
and THOMPSON,* District Judge.

The district court originally had jurisdiction pursuant to 28 U.S.C. § 1331. After the federal claim was dismissed, the district court exercised jurisdiction over the remaining state claims pursuant to 28 U.S.C. § 1367. The two intervenor groups: Dunmeyer et al. (Dunmeyer) and Forster et al. (Forster) assert that we have jurisdiction to review six orders from the district court: order denying motions of Forster to intervene as class representatives for purposes of appeal and Dunmeyer to intervene (May 11, 1994); order denying motion for partial summary judgment on choice of law and class decertification (August 18, 1993); order denying reconsideration of choice of law and class decertification (September 20, 1993); order denying motion for partial summary judgment to determine choice of law for proposed recertification class (January 18, 1994); order denying motion for recertification and proposed alternative class (January 18, 1994); and order denying motion to nullify settlements and reinstate class members (August 18, 1993).

* Honorable Gordon Thompson, Jr., United States District Judge, Southern District of California, sitting by designation.

On September 16, 1994, this court's appellate commissioner construed Becton, Dickinson & Company's (Becton) motion to dismiss these orders for lack of jurisdiction as a motion to limit the scope of appeal. We granted the motion, with the exception of the appeal from the May 11, 1994, order.

On September 23, 1994, the settlement between plaintiff, David M. Koepke and Becton became final as the district court entered an order of vacatur and dismissal for the entire suit. However, the intervenors never filed a notice of appeal from this order. Rather, they filed, on October 13, 1994, a motion to expand the remaining appeal of May 11, 1994, to include all the previously dismissed orders as well as the order to vacate and dismiss.

I

We must first decide whether the district court may be sustained in denying Dunmeyer intervention and in denying Forster intervention as class representatives for purposes of appeal. Federal Rule of Civil Procedure 24 creates two types of intervention: intervention as a matter of right and

permissive intervention. Denial of intervention as a matter of right is reviewed de novo. Idaho Farm Bureau Fed v. babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

Rule 24(a)(2) establishes a four-fold test for intervention of right for those situations not covered by the unconditional statutory intervention rights under Rule 24(a)(1). Under Rule 24(a)(2), a court must allow a third-party's intervention as right if four conditions are met: if the motion is timely; if the interest asserted relates to the property or transaction which is the subject of the action; if intervention is necessary to prevent, as a practical matter, impairing or impeding of the third-party's interest; and if the interest is inadequately represented by other parties. United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986), vacated on other grounds, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); see also Blake v. Pallan, 554 F.2d 947, 951 (9th Cir. 1977) (Blake). Parties dispute the last two conditions.

Dunmeyer asserts that the impairment or impediment of interest condition involves a flexible approach. He argues that courts must allow intervention even if the applicant could simply file another action but would suffer inconvenience and waste effort as a result. Our precedent rejects this position. "Mere inconvenience" or supposed judicial economy considerations are not enough to mandate intervention as of

right. Blake, 554 F.2d at 954. Dunmeyer has failed to show how his interests would be hurt by bringing separate suits; he, therefore, does not meet this prong of the Stringfellow test. Since all four prongs of the Stringfellow test must be met, we need not consider whether the Dunmeyer intervenors' interests were adequately represented.

Dunmeyer further alleges that the district court must be reversed for failing to allow permissive intervention. Denial of permissive intervention is reviewed for abuse of discretion. Employee Staffing Services v. Aubry, 20 F.3d 1038, 1042 (9th Cir. 1994).

Rule 24(b) allows permissive intervention if three conditions are met: the movant shows an independent ground for jurisdiction, the motion is timely, and there exists a common question of law and fact between movant's claim and the main action. This rule further instructs the court to consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Venegas v. Skaggs, 867 F.2d 527, 529-30 (9th Cir. 1989). The district court identified numerous factors which weighed against permissive intervention: there would be delay to current main parties; the applicant-intervenors' best interest would be served by separate actions; additional discovery would prejudice present parties but disallowing discovery would prejudice applicant-intervenors; and, choice of law

issues would reemerge if intervention were allowed. These factors seem reasonable, and the district court did not abuse its discretion when it relied on them to deny Dunmeyer's motion to intervene.

II

On September 16, 1994, this court dismissed appeal of all orders, except the May 11, 1994, which denied Dunmeyer intervention and denied Forster request for designation as class representatives for purposes of appeal. We now turn to whether the district court properly denied Forster's request. The district court is reviewed for abuse of discretion. Baby Neal for and by Kantor v. Casey, 43 F.3d 48, 56 (3d Cir. 1994).

The district court stated that there was no authority for appointing seven plaintiff intervenors as class representatives of other decertified plaintiffs. Such designation could lead other decertified plaintiffs to believe a class action still was being prosecuted and thus forego their own, private actions.

These reasons appear reasonable; the district court has not abused its discretion. We affirm the district court's refusal to designate Forster as class representative.

We now turn to the five dismissed interlocutory orders. Unlike the May 11, 1994, orders, these appeals were dismissed as appeals from nonfinal, interlocutory orders.

When the underlying suit was settled and the district court entered a final order of vacatur and dismissal, Dunmeyer did not file a notice of appeal from that final order, but filed a motion to "expand" the present appeal to include the previously dismissed appeals and the district court's final order. This is insufficient. The filing of a motion to expand the appeal is not a notice of appeal or the "functional equivalent" of a notice of appeal. The motion appellants filed merely states the intention to expand the review of the May 11, 1994, order currently before this court and nothing more; it does not clearly convey the information which a proper notice of appeal would contain.

We affirm the district court's rulings denying intervention to Dunmeyer and declining to designate Forster as a class representative. We do not have jurisdiction to consider the other orders purportedly before us.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[FILED 12/21/1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID M. KOEPKE,	) No. 94-16153
Plaintiff,	) D.C. No.
	) CV-88-01084-EJG
and	) Eastern California
	) (Sacramento)
RICHARD A. FORSTER, et a.,	)
Intervenors/Proposed Intervenors - Appellants,	)
vs.	)
BECTON-DICKINSON & COMPANY,	) ORDER
Defendant-Appellee.	)

Before: SNEED, D.W. NELSON, and TROTT, Circuit Judges

Appellants' motion for leave to file a reply in support of their motion to expand review of the trial court's orders is granted. Appellants' motion to expand review of the trial court's orders and appellee's second motion to dismiss the appeal are denied without prejudice to renewal of the arguments in the briefs on the merits. A new briefing schedule will be set by the court mediator.

[FILED 9/16/1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID M. KOEPKE,	No. 94-16153
Plaintiff,	D.C. No. CV-88-01084-EJG
and	Eastern California (Sacramento)
RICHARD A. FORSTER, et a.,	
Intervenors/Proposed Intervenors - Appellants,	
vs.	
BECTON-DICKINSON & COMPANY,	ORDER
Defendant-Appellee.	

Before: Peter L. Shaw, Appellate Commissioner

Appellee's motion to dismiss the appeal for lack of jurisdiction is construed as a motion to limit the scope of the appeal. So construed, the motion is granted in part and denied in part. The June 7, 1994 notice of appeal was not filed within 30 days of entry of the district court's August

18, September 20, 1993, and January 18, 1994 orders and thus is not timely to seek review of them. See Fed. R. App. P. 4(a)(1). Furthermore, the August 18, 1993, September 20, 1993, and January 18, 1994 orders are not final or immediately appealable. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). Accordingly, appellee's motion to limit the scope of the appeal is granted as to these orders.

As appellee concedes, however, that portion of the district court's May 11, 1994 order that denied leave to intervene is immediately appealable. See In re Benny, 791 F.2d 712, 720-21 (9th Cir. 1987). To the extent that appellee seeks to further limit this court's review of the May 11, 1994 order, the motion is denied without prejudice to renewal of the arguments in the briefs. Accordingly, appellants may raise all issues presented by the May 11, 1994 order in the briefs on the merits.

Appellee's motion for leave to file a reply in support of the motion to dismiss is granted. See Fed. R. App. P. 27(a). Appellee's request for double attorneys' fees and costs on the motion as a sanction for filing a frivolous appeal is denied. Appellants' motion for leave to file oversized opening and reply briefs is denied. A new briefing schedule will be set by the Court Mediator.

General Order 6.3(e)

[FILED 6/7/1994
CLERK
DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA]

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE,	)
	)
Plaintiff,	)
	)
HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRETT, ERNEST R. PROCALO,	) NO. CIVS 88-1084 EJG-GGH
	)
Individual	) NOTICE OF JOINT APPEAL
	)
	)
	)

RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II	)
Intervenors for Purposes of Appeal of Class Issues,	)
vs.	)
BECTON, DICKINSON and COMPANY, a foreign corporation,	)
Defendant.	)

NOTICE IS HEREBY GIVEN that individual intervenors Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret and Procalo, and intervenors for the purposes of appealing class issues Forster, Jones, Oravetz, Peckels, White, Williams and Zucht, plaintiff intervenors and/or former class members in the above-named case, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from orders entered in this action on the dates specifically noted as follows:

Order	Date of Entry
Order Denying Individuals' Motions for Intervention	5/11/94
Order Decertifying the Class	8/18/93
Order Denying Reconsideration of Class Decertification	9/20/93
Order Denying Motion for Partial Summary Judgment to Determine Choice of Law For Proposed Recertified Class	1/18/94
Order Denying Motion for Recertification of Proposed Alternative Class	1/18/94
Order Denying Motion to Nullify Settlements and Reinstate Class Members	8/18/93
Orders Denying Motion Requesting Intervenors be Appointed Class Representatives for Purposes of Appeal	5/11/94

DATED this 6th day of June, 1994.

SCHWABE, WILLIAMSON, FERGUSON & BURDELL

By: _____

James M. Thomas
WSBA # 07512
Attorneys for Individual Intervenors Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret and Procalo; Intervenors for Purposes of Appealing Class Issues Forster, Jones, Oravetz, Peckels, White, Williams and Zucht

B-5

[FILED 10/14/94
9TH CIRCUIT]

Docket No. 94-16153

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT DAVID M. KOEPKE,
Plaintiff,

HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRETT, ERNEST R. PROCALO,

Individual Intervenors, Joint Appellants

RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II

Intervenors for Purposes of Appeal of Class Issues, Joint Appellants

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Appellee.

B6

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CV-88-1084 EJG/GGH

Joint Appellants' Motion to Expand
Review of Trial Court's Orders

JAMES M. THOMAS
SCHWABE, WILLIAMSON,
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Attorneys for Joint Appellants
Dunmeyer, Furuta, Jackson, John
Karch, Kentala, Perret, Procalo,
Forster, Jones, Oravetz, Peckels,
White, Williams, Zucht.

COME NOW Joint Appellants, Herbert W. Dunmeyer, Kerry T. Furuta, Julie Ender Jackson, Gary L. Johnson, Terry B. Karch, David K. Kentala, Bruce A. Perret, Ernest R. Procalo, Richard A. Forster, Gary C. Jones, Ray A. Oravetz, Robert M. Peckels, Jr., Jere C. White, and Joseph B. Zucht, II, by and through their counsel of record, Schwabe, Williamson, Ferguson & Burdell and James M. Thomas, and pursuant to FRAP 27, move this Court for entry of an order expanding appellate review of the trial court's orders in this

matter.

GROUND UPON WHICH THE MOTION IS BASED

This Motion is based upon the entry of an order by the trial court on September 23, 1994 dismissing all claims of the named plaintiff in the action before him, David M. Koepke, and upon the Declaration of James M. Thomas accompanying this Motion.

Pursuant to the Rules on Appeal and established case law, there is no debate that the following orders of the trial court must now, under any definition of the word, be determined to be final and appealable orders by the joint appellants before this Court:

Order	**Date of Entry**
Order Denying Motion for Partial Summary Judgment to Determine Choice of Law, and Decertifying the Class	August 18, 1993
Order Denying Reconsideration of Choice of Law Ruling and Class Decertification	Sept. 20, 1993
Order Denying Motion for Partial Summary Judgment to Determine Choice of Law for Proposed Recertified Class	January 18, 1994
Order Denying Motion for Recertification of Proposed Alternative Class	January 18, 1994

Order Denying Motion to Nullify Settlements and Reinstate Class Members	August 18, 1994
Order Vacating Prior Orders and Stipulations Entered into by Defendant Becton Dickinson	Sept. 23, 1994

While Becton Dickinson objected to orders entered August 18, 1993, September 20, 1993 and January 18, 1994 as being "interlocutory" previously, with the entry of the trial court's order of September 23, 1994, no underlying case exists any longer between Becton Dickinson and David M. Koepke, the named plaintiff in that trial court action. The reasoning set out in United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), requires that all these orders now be considered by the Ninth Circuit.

Joint appellants Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret, Procalo, Forster, Jones, Orvaetz, Peckels, White, Williams and Zucht respectfully assert the federal rules, established case law, equity and good practice call for the expeditious granting of their motion to expand review of the trial court's orders.

ORDER OR RELIEF SOUGHT

The joint appellants seek the entry of an order expanding review of the trial court's orders before this Court from the May 11, 1994 order presently under review, to include the following orders:

Order	Date of Entry
Order Denying Motion for Partial Summary Judgment to Determine Choice of Law, and Decertifying the Class	August 18, 1993
Order Denying Reconsideration of Choice of Law Ruling and Class Decertification	Sept. 20, 1993
Order Denying Motion for Partial Summary Judgment to Determine Choice of Law for Proposed Recertified Class	January 18, 1994
Order Denying Motion for Recertification of Proposed Alternative Class	January 18, 1994
Order Denying Motion to Nullify Settlements and Reinstate Class Members	August 18, 1994
Order Vacating Prior Orders and Stipulations Entered into by Defendant Becton Dickinson	Sept. 23, 1994

RESPECTFULLY SUBMITTED this 13th day of October, 1994.

SCHWABE, WILLIAMSON,
FERGUSON & BURDELL

By: _____

James M. Thomas
WSBA # 07512
Attorneys for Joint Appellants Herbert W. Dunmeyer, Kerry T. Furuta, Julie Ender Jackson, Gary L. Johnson, Terry B. Karch, David K. Kentala, Bruce A. Perret, Ernest R. Procalo; Richard A. Forster, Gary C. Jones, Ray A. Oravetz, Robert M. Peckels, Jr., Jere C. White, James D. Williams, and Joseph B. Zucht, II

[FILED 12/6/89]
CLERK
EASTERN DISTRICT OF CALIFORNIA

SYLVESTER RUUD PETRIE & CRUZEN
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, Plaintiff, v. BECTON-DICKINSON, Defendant.	No. CIVS-88-1084 EJG-JFM STIPULATED ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT AS AMENDED

THIS MATTER having come on before the above-entitled Court on the duly noted motion for partial summary

judgment by Plaintiff Class Representative Koepke, and this Court having considered:

(1) Plaintiff Class Representative Koepke's motion and memorandum in support of Motion for Partial Summary Judgment, filed September 29, 1989;

(2) Affidavit of James M. Thomas in support of Motion for Partial Summary Judgment, filed September 29, 1989; and

(3) Stipulation of Defendant Becton-Dickinson, filed November 17, 1989;

and the parties stipulating to the entry of this Order, and the Court determining that Plaintiff Class Representative Koepke is entitled to the granting of the motion for partial summary judgment, it is now, therefore

ORDERED that the motion for partial summary judgment by Plaintiff Class Representative Koepke is granted; and it is further

ORDERED that the jury in Lillig v. Becton-Dickinson, Case No. 80-2-07648-5 (King County, Washington, Superior Court) ("Lillig"), found (a) that Becton-Dickinson breached the FY 1979 Incentive Compensation Plan ("1979 Bonus Plan) in determining the amount of the Region 9 bonus pool and (b) that the amount of the Region 9 bonus pool for fiscal year 1979 that should have been distributed to the Region 9 Field Sales

Representatives was $207,954; and it is further

ORDERED that Becton-Dickinson is collaterally estopped from relitigating in this action the issue of whether it breached the 1979 Bonus Plan, based on the judgment in Lillig.

Dated: 12/6/89

_____

HONORABLE EDWARD J. GARCIA,
UNITED STATES DISTRICT COURT JUDGE

Stipulated Order Presented by:

SYLVESTER RUUD PETRIE & CRUZEN

By: _____

JAMES M. THOMAS
Attorneys for Plaintiff
Class Representative
David M. Koepke

Copy Received; Stipulated Agreement as to
Form and Content

DINKELSPIEL & DINKELSPIEL

By _____
CECIL E. MORRIS
Attorneys for Defendant

[FILED 1/25/90]
CLERK
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE,	)	No. CIVS-88-1084 EJG-JFM
	)	
Plaintiff,	)	
	)	
v.	)	STIPULATED ORDER GRANTING
	)	MOTION FOR PARTIAL SUMMARY
BECTON-DICKINSON,	)	JUDGMENT
	)	
Defendant.	)	
	)	

THIS MATTER having come on before the above-entitled Court on the duly noted motion for partial summary

judgment by Plaintiff Class Representative Koepke, and this Court having considered:

(1) Plaintiff Class Representative Koepke's motion and memorandum in support of Motion for Partial Summary Judgment, dated July 27, 1989;

(2) Affidavit of James M. Thomas in support of Motion for Partial Summary Judgment, dated July 27, 1989;

(3) Stipulation of Defendant Becton-Dickinson, dated September 15, 1989; and

(4) Reply Memorandum of Plaintiff, dated September 18, 1989;

and the Court determining that Plaintiff Class Representative Koepke is entitled to the granting of the motion for partial summary judgment, it is now, therefore

ORDERED that the motion for partial summary judgment by Plaintiff Class Representative Koepke is granted; and it is further

ORDERED that the "FY 1979 Incentive Compensation Plan" at issue in said motion, a copy of which is attached hereto as Exhibit A, is, as a matter of law, an enforceable written contract between Becton-Dickinson and its Region Nine field sales representatives who are eligible pursuant to Section 7 "Eligibility" of the "FY 1979 Incentive Compensation Plan"; and it is further

ORDERED that the letter from Mr. A. Coomans at

Becton-Dickinson, dated February 23, 1979, and the "FY 1979 Incentive Compensation Plan" attached to it, Exhibits B and C, respectively, to Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, states additional terms of employment and compensation between Becton-Dickinson and Plaintiff Koepke.

_____

HONORABLE EDWARD J. GARCIA,
UNITED STATES DISTRICT COURT JUDGE
1/25/90

Presented by:

SYLVESTER RUUD PETRIE & CRUZEN

By _____

JAMES M. THOMAS
Attorneys for Plaintiff
Class Representative
David M. Koepke

Copy Received; Agreement as to
Form and Content:

DINKELSPIEL & DINKELSPIEL

By _____
CECIL E. MORRIS
Attorneys for Defendant

February 23, 1979

MEMO TO: HOSPITAL-MEDICAL REPRESENTATIVES
LABORATORY PRODUCTS REPRESENTATIVES

SUBJECT: FY 1979 Bonus Plan

Attached is your copy of the FY 1979 Bonus Plan.

This plan is the same as last year's plan with one exception - the additional bonus rate on P/L 48 (I.V. Catheters) has been eliminated. This product line will earn the same percentage as the other product lines.

Please review this plan carefully. Should you have any questions, please contact your Regional Manager.

Best regards,

A. Coomans
Attachments

[EXHIBIT A]

FY 1979 INCENTIVE COMPENSATION PLAN

1. REGIONAL PERFORMANCE VERSUS PRIOR YEAR

   Incentive monies will accrue on a Regional basis when Region exceeds 1978 sales. In the event a Region does not exceed prior year sales, no bonus will be paid.

2. BONUS RATE

   a. The rate of bonus will be 4.5% of Regional sales increase over prior year.

   b. Comparisons to prior year will be based on adjusted gross Regional sales, which is defined as shipments less returns and adjustments. These are the same figures reflected in the monthly Territorial "C" and Regional "C-1" Reports.

3. APPORTIONMENT OF REGIONAL BONUS POOL

The Regional bonus pool will be apportioned by the RSM with approval of the ASM and the Director of Trade Sales according to the following formula:

a. The individual territory contribution to Regional performance. Note: Documented transfer orders should be encouraged and records maintained in the Regional Office.

b. The retention of business on major product lines in key accounts.

c. Market penetration of new products and broadened sales of existing product lines.

d. Comparison of territorial versus regional performance on major product lines. This will be accomplished by comparing the Territorial "C" Report against the Regional "C-1" Report.

4. REGIONAL PERFORMANCE VERSUS BUDGET

Additional bonus monies will accrue when the national sales budget is exceeded. A bonus rate of an additional 4.5% will be applied to adjusted gross sales over the FY 1979 national budget. This fund will be distributed only among those Regions which exceed their budget. Your RSM will distribute these funds based on your contribution as outlined above.

5. The Incentive Compensation Plan will be supplemented throughout the year by periodic sales contests.

6. B-D Division reserves the right to make adjustments in the above formula in cases of windfall volume, adverse economic factors, or new product sales.

ELIGIBILITY

The employment status and length of service necessary to be eligible for a field sales bonus is as follows:

a. No bonus will be paid to any sales representative who is not on roll on December 1, 1979.

b. No bonus will be paid to anyone who has completed less than six months of service at the end of the Fiscal Year.

c. 50% may be paid to those with more than six months but less than nine months of service.

d. 75% may be paid to those with more than nine months but less than one year of service.

e. A full year of service during the Fiscal Year is necessary for full participation in the plan.

f. In the event of transfer to any position in the corporation, one-twelfth (1/12) of the earned territorial yearly bonus will be paid to the Field Sales Representative for each month of territorial coverage.

[FILED 6/18/91]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, individually and as class representative,	
Plaintiff,	CIV NO. S-88-1084 EJG/GGH
BECTON, DICKINSON and COMPANY,	ORDER AFTER HEARING
Defendant.	

This matter was before the court on June 6, 1991 for hearing on plaintiff's motion for partial summary judgment and the court's status conference. James M. Thomas and A. Edward Briseno appeared on behalf of plaintiff. Kent Jonas and Bruce W. Belding appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. The parties stipulate that the amount of money that should have been distributed to the Region 9 Field Sales Representatives was erroneously stated as $207,954 in the order entered December 6, 1989, and that the correct amount is $209,904.

2. Both parties' requests that the court take judicial notice of documents submitted regarding the motion are granted.

3. Plaintiff's motion for partial summary judgment is granted. The court now rules that Becton, Dickinson & Company's taking of monies from the Becton-Dickinson Division Region 9 Field Sales Representatives' fiscal year 1979 bonus pools to pay its Region 9 Regional Sales Manager and its "District Manager, Laboratory Products" in calendar year 1979 amounted to 1) a breach of contract between the defendant and its Becton-Dickinson Division Region 9 eligible field sales representatives, and 2) conversion.

4. The status conference is continued to October 18, 1991 at 9:30 a.m. The parties are directed to file, ten days before the conference, supplemental status reports addressing the further scheduling of this matter.

5. A settlement conference is scheduled before the Honorable David F. Levi for September 13, 1991 at 3:30 p.m. Any requests for rescheduling the date and/or time of

the settlement conference shall be directed to Judge Levi's courtroom deputy clerk. Each party shall submit confidential settlement conference statements directly to the chambers of Judge Levi seven (7) days before the conference. Said statements are neither to be filed with the clerk nor served on opposing counsel, but the parties shall notify each other that the statements have been submitted.

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///

IT IS SO ORDERED.

Dated: June 14, 1991.

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

[FILED 8/18/93]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, individually and as class representative,	
Plaintiff,	CIV NO. S-88-1084 EJG/GGH
BECTON, DICKINSON and COMPANY,	ORDER AFTER HEARING
Defendant.	

This matter was before the court on August 13, 1993, for hearing on various motions filed by the parties. James Thomas appeared on behalf of plaintiff. Donald Ware, Claire LaPorte and Mr. Webber appeared on behalf of defendant. After considering the parties' written and oral arguments and the record on this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Plaintiff's motion for clarification is resolved in the following manner: persons who settled with defendant or who opted out of the class are no longer class members.

2. Plaintiff's motion to nullify settlements is denied.

3. Plaintiff's motion for partial summary judgment on choice of laws and requesting a finding by the court that California law applies to all claims by all class members, is denied.

4. Defendant's motion to decertify the class is granted.

5. Hearing on the balance of the motions, as well as a status conference, are continued to September 17, 1993 at 9:00 a.m. The parties are directed to file supplemental status conference reports addressing the impact of the court's rulings on the remainder of the case. **NO FURTHER BRIEFING IS REQUESTED, NO WILL IT BE ACCEPTED**, in connection with the remaining six motions.

IT IS SO ORDERED.

Dated: August 13, 1993

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

[FILED 9/20/93]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, individually and as class representative,	)
Plaintiff,	) CIV NO. S-88-1084 EJG/GGH
BECTON, DICKINSON and COMPANY,	) ORDER AFTER HEARING
Defendant.	)

This matter was before the court on September 17, 1993, for hearing on various motions filed for a status conference. James Thomas appeared on behalf of plaintiff. Donald Ware and Claire LaPorte appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Plaintiff's motion for reconsideration of the court's choice of laws and decertification rulings of August 13, 1993, is denied.

///

///

2. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied. The court finds that factors of judicial economy, fairness and convenience weigh in favor of retaining jurisdiction over the pendent claims.

3. The following motions, all of which were prepared and filed **prior** to the court's decertification ruling and at a time when this case was a nationwide class action, are denied as moot. In their present form they cannot be applied to a single plaintiff action.

a) Defendant's motion for relief from stipulations;

b) Defendant's motion for summary judgment regarding the statute of limitations;

c) Defendant's motion for summary judgment on all claims;

d) Plaintiff's motion for partial summary judgment regarding the existence of partially integrated contracts for 1978-1981 in all twelve regions; and

e) Plaintiff's motion for partial summary judgment regarding a determination that defendant failed to pay Region 9 sales representatives in 1979.

4. Plaintiff's request for "modification" of the class is rendered moot by the court's decertification order. To the extent the request, raised for the first time in plaintiff's reply brief in support of reconsideration and in his status report, is a request for certification of an alternative class, the request is denied without prejudice.

5. Plaintiff shall notify the court and opposing counsel no later than 4:30 p.m. September 23, 1993, if he intends to file a motion for certification of an alternative class, or if he intends to proceed to trial as a single plaintiff action on December 6, 1993.

6. In the event plaintiff intends to proceed to trial with the case in its present posture, with a single plaintiff, defendant shall file and serve its dispositive motions, directed solely to the single plaintiff, no later than Friday October 1, 1993. A hearing on the motions will be held at 9:00 a.m. on October 29, 1993. The parties are directed to Local Rule 230 for the remainder of the briefing schedule.

7. In the event plaintiff seeks certification of an alternative class, the final pretrial conference and trial date will be vacated. Plaintiff's motion for certification shall be filed in accordance with the provisions of Local Rule 230,

and will be heard at 9:00 a.m. on January 14, 1994. A status conference will be held immediately following the hearing on the motion. The parties shall file supplemental status reports ten days prior to the conference.

8. Service on the opposing party of any brief filed pursuant to paragraphs 6 and 7, above shall be by facsimile or overnight mail. NO BRIEF SHALL EXCEED 20 PAGES IN LENGTH.

IT IS SO ORDERED.

Dated: September 20, 1993

_____

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

[FILED 1/18/94]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE	)
	)
Plaintiff,	) CIV NO. S-88-1084 EJG/GGH
	)
BECTON, DICKINSON and COMPANY,	) ORDER AFTER HEARING) ORDER CONTINUING STATUS) CONFERENCE
Defendant.	)
	)
	)
	)

This matter was before the court on January 14, 1994, for hearing on plaintiff's motions for partial summary judgment regarding choice of laws, recertification, and intervention of subclass representative, and for a status conference. James Thomas appeared on behalf of plaintiff. Donald Ware and Claire LaPorte appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Plaintiff's motion for partial summary judgment is denied.

2. Plaintiff's motion for recertification is denied.

3. Plaintiff's motion for intervention is denied as moot.

4. The parties are directed to meet and confer concerning a form of Notice to send to the former class members informing them of the court's ruling decertifying the class action. In the event the parties' cannot agree on the form of Notice, and in the event informal court intervention does not resolve the matter and written briefs are required, a hearing on the matter will be held at 9:00 a.m., March 25, 1994.

5. If agreement can be reached prior to January 28, 1994, the Notice to former class members shall be sent to them on or before February 1, 1994. Any appropriate motion former class members may wish to file in response to the court's decertification order shall be filed and served on all parties no later than March 11, 1994, so that the motions can be heard at 9:30 a.m., April 15, 1994.

6. The status conference is continued to 9:30 a.m., April 15, 1994. The parties shall file supplemental status reports no later than April 5, 1994.

7. Defendant's anticipated summary judgment directed at the claims of the sole remaining plaintiff, David Koepke, may be heard at 9:00 a.m., March 25, 1994, since defendant has already reserved the hearing date for that purpose. However, the parties are advised that intervening events in this case may counsel against resolving the motion at that time. At defendant's request, the page limitation previously placed on the parties is lifted for briefs filed in connection with defendant's anticipated summary judgment motion. This is not an open invitation for lengthy briefs. Counsel are still admonished to be brief.

IT IS SO ORDERED.

Dated: January 14, 1994

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

[FILED 5/11/94]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE

Plaintiff,

CIV NO. S-88-1084 EJG/GGH

BECTON, DICKINSON and COMPANY,

MEMORANDUM OF DECISION AND ORDER AFTER HEARING

Defendant.

FORSTER, JONES, ORAVETZ, PECKELS, WHITE, WILLIAMS and ZUCHT,

Movants to intervene for purposes of appeal.

JACKSON, KARCH, DUNMEYER, KANTALA, PERRET, JOHNSON, FURUTA and PROCALO,

Movants to intervene.

This matter was before the court on April 29, 1994, for hearing on the following motions: (1) defendant's motion

for reconsideration of the March 28, 1994, Order After Hearing denying summary judgment for defendant on plaintiff's seventh cause of action (breach of fiduciary duty), ninth cause of action (conversion), eleventh cause of action (fraud), and prayer for punitive damages; (2) motions of movant intervenors Forster, Jones, Oravetz, Peckels, White, Williams, and Zucht to intervene for purposes of appeal; (3) motions of movant intervenors Jackson, Karch, Dunmeyer, Kentala, Perret, Johnson, Furuta and Procalo to intervene as of right (F.R.Civ.P. 24(a)(2)); and (4) motion of movant intervenors Jackson, Karch, Dunmeyer, Kentala, Perret, Johnson, Furuta and Procalo for permissive intervention (F.R.Civ.P. 24(b)). This Memorandum Decision and Order After Hearing will address each issue seriatim.

1. Motion for reconsideration.

After oral argument, this court took under submission defendant's motion for reconsideration, to further consider the case of Watts v. International Health Services, 1994 WL 90060 (N.D. Cal.) (not reported in F. Supp.).

Defendant seeks reconsideration of our order denying summary judgment on plaintiff's claims for conversion, breach of fiduciary duty, and fraud, and on plaintiff's prayer for punitive damages. With regard to the conversion and breach of fiduciary duty claims, defendant challenges this court's June 18, 1991, Order After Hearing ruling that

monies were "taken" from the 1979 Region 9 bonus pool to pay management. This court is not inclined to revisit that decision, for reasons stated on the record during the March 25, 1994, law and motion hearing on defendant's motion for relief from stipulations and orders.

With regard to the fraud claim and the prayer for punitive damages, defendant contends that our denial of summary judgment motion showed no consideration of the recent California Supreme Court decision of Hunter v. Up-Right, 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8 (Cal. 1993). This court has in fact considered that decision, but finds the case limited to the employment termination setting. Defendant now requests that we extend the Up-Right holding to all suits by employees against employers arising out of the employment contract. Defendant cites as authority the case of Watts v. International Health Services, 1994 WL 90060 (N.D. Cal.). The Watts opinion, however, fails to indicate whether or not it addresses an employment termination scenario, and thus provides no clear support for defendant's position. In essence, defendant asks that we make new law, ruling that policy considerations require extension of Up-Right to all employment cases. This court declines to do so.

For all the foregoing reasons, defendant's motion for reconsideration is DENIED.

2. Motions to intervene for purposes of appeal.

For reasons stated in open court on the record, the motions of movant intervenors Forster, Jones, Oravetz, Peckels, White, Williams and Zucht to intervene for purposes of appeal are GRANTED. Movant intervenors' request for notice to former class members is DENIED.

3. Motions to intervene as of right.

For reasons stated in open court on the record, the motions of movant intervenors Jackson, Karch, Dunmeyer, Kentala, Perret, Johnson, Furuta, and Procalo to intervene as of right, pursuant to F.R.Civ. P. 24(a)(2), are DENIED.

4. Motion for permissive intervention.

Movant intervenors Jackson, Karch, Dunmeyer, Kentala, Perret, Johnson, Furuta, and Procalo seek leave for permissive intervention. Permissive intervention requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action. Beckman Industries, Inc. v. International Ins. Co., 966 F.2d 470 (9th Cir. 1992). As this court noted on the record in the April 29, 1994 hearing, the first requirement is not here met because the complaints in intervention fail to allege facts showing an independent basis for jurisdiction. This court's prior ruling of September 17, 1993, established that supplemental jurisdiction is available for plaintiff Koepke alone.

Supplemental jurisdiction is not available for movant intervenors.

This court recognizes that 28 U.S.C. § 1953 establishes a liberal policy of free amendment to correct defective allegations of jurisdiction. See also F.R.Civ.P. 15; Fidelity & Casualty Co. v. Reserve Ins. Co., 596 F.2d 914 (9th Cir. 1979). However, it is worth noting that this court has balanced the equities, and within its discretion is inclined to deny permissive joinder, for reasons stated on the record in open court. Having considered the merits, this court believes no purpose would be served in movants amending their complaints in intervention to correct the jurisdictional allegations. Therefore, in the interests of judicial economy, the motion for permissive intervention, of Jackson, Karch, Dunmeyer, Kentala, Perret, Johnson, Furuta, and Procalo is DENIED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: May 4, 1994.

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

C-30

[FILED 6/10/94
9TH Circuit]

U.S Court of Appeals Docket Number:
US.D.Ct. (E.D. Cal.)
Number: CIVS 88-1084 EJG/GGH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID M. KOEPKE,

Plaintiff,

HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRET, ERNEST R. PROCALO

Individual Intervenor Appellants,

RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II,

Former Class Member Intervenor Appellants,

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Defendant/Appellee.

C-31

REPRESENTATION STATEMENT OF COUNSEL FOR JOINT APPELLANTS

James M. Thomas
SCHWABE, WILLIAMSON, FERGUSON & BURDELL
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 622-1711
Attorneys for Plaintiff/Appellants

COMES NOW James M. Thomas of Schwabe, Williamson, Ferguson & Burdell, and states, pursuant to F.R.A.P. 12(b), he represents the following named individual appellants:

Herbert W. Dunmeyer
Kerry T. Furuta
Julie Ender Jackson
Gary L. Johnson
Robert M. Peckels, Jr.
David K. Kentala
Bruce A. Perret
Ernest R. Procalo
Richard A. Forster
Gary C. Jones
Ray A. Oravetz
Terry B. Karch
Jere C. White
James D. Williams
Joseph B. Zucht, II

RESPECTFULLY SUBMITTED this 15th day of June, 1994.

SCHWABE, WILLIAMSON, FERGUSON & BURDELL

By _____
JAMES M. THOMAS, WSBA: 7512
Attorneys for Appellants

I certify that a copy of this Representation Statement of Counsel for Joint Appellants was submitted to the Clerk of the U.S. Court of Appeals, and that it was served on each party/counsel as follows:

Counsel for Defendant/Appellee Becton Dickinson and Company:

Donald R. Ware
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
Telephone: (617) 482-1390

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Via United States Mail, postage prepaid, on this the 15th day of June, 1994.

_____

KATHY TENDICK

[FILED 8/15/94]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE Plaintiff, BECTON, DICKINSON and COMPANY, Defendant.	) CIV NO. S-88-1084 EJG/GGH) ORDER AFTER HEARING

This matter was before the court on August 12, 1994, for hearing on plaintiff's motion for partial summary adjudication of issues. James Thomas appeared on behalf of plaintiff. Donald Ware appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Plaintiff's motion for partial summary adjudication of issues is granted in part and denied in part.

The court finds that plaintiff is entitled to 14% of the Region 9 Sales Representatives' Bonus pool for 1979 and that the amount he is owed is $7,832. However, to the extent plaintiff seeks a determination of liability on the section 203 claim, the motion is denied.

2. Defendant's motion for reconsideration of the magistrate judge's July 21, 1994 discovery order is denied.

IT IS SO ORDERED.

Dated: August 12, 1994

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

[FILED 9/22/94]
CLERK
EASTERN DISTRICT OF CALIFORNIA

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Attorneys for Defendant
BECTON, DICKINSON AND COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, Plaintiff, v. BECTON, DICKINSON AND COMPANY, Defendant.	No. CIVS-88-1084 EJG-GGH MOTION FOR ENTRY OF ORDER OF VACATUR AND DISMISSAL

Defendant Becton, Dickinson and Company ("BD") respectfully requests that the Court enter an order, in the

form attached hereto, vacating all prior orders, vacating all stipulations entered into by BD, and dismissing the action with prejudice.

Respectfully submitted,

FOLEY, HOAG & ELIOT

By: _____
(Pro Hac Vice)

Dated: September 21, 1994

Plaintiff David M. Koepke assents to this motion.

MEMERING, VARANINI, CROWLE
& TRIMBLE

By: _____
Bruce L. Shaffer

Dated: September 22, 1994

[FILED 9/22/94]
CLERK
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE, Plaintiff, v. BECTON, DICKINSON AND COMPANY, Defendant.	No. CIVS-88-1084 EJG-GGH PROOF OF PERSONAL SERVICE

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of eighteen years and not a party to the within-entitled action. My business

address is Radio Flyers, 915 L Street, Suite C-405, Sacramento, California 95814.

On September 22, 1994, I served a copy of the following: NOTICE FOR ENTRY OF ORDER OF VACATUR AND DISMISSAL; DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER OF VACATUR AND DISMISSAL; and ORDER by personally delivering the documents to the following party(ies):

Bruce L. Shaffer
Memering, Varanini, Crowle & Trimble
2720 Gateway Oaks Drive, #300
P.O. Box 590
Sacramento, CA 95833

Executed on September 22, 1994, at Sacramento, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

Name _____
Radio Flyers

[FILED 9/22/94]
CLERK
U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DAVID M. KOEPKE	)
	)
Plaintiff,	) CIV NO. S-88-1084 EJG/GGH
	)
BECTON, DICKINSON and COMPANY,	) ORDER
	)
	)
Defendant.	)
	) Hon. Edward J. Garcia
	)
	)

Having considered the motion for vacatur of all prior orders and stipulations and dismissal of this action with prejudice and the memorandum in support of the motion; having further considered the competing values of finality of judgment and right to relitigation of unreviewed disputes; and having FOUND upon such consideration that, in the circumstances of this action, the right to relitigation of unreviewed disputes outweighs the interest in finality, it is HEREBY ORDERED that:

1. All prior orders entered by this Court and all prior stipulations entered into by defendant in the above-captioned matter are and shall be hereby VACATED and shall have no effect in any other proceedings;

2. No prior order entered by this Court or prior stipulation entered into by defendant in the above-captioned matter shall be cited in any other proceeding;

3. The above-captioned matter is and shall be hereby DISMISSED WITH PREJUDICE; and

4. Neither David M. Koepke nor Becton, Dickinson and Company shall be awarded costs or attorneys' fees.

Dated: 9/23/94

EDWARD J. GARCIA,
UNITED STATES DISTRICT JUDGE

Federal Rules of Appellate Procedure

Rule 3. Appeal as of Right -- How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may therefore proceed on appeal as a single appellant. Appeals may be consolidated by order of the court

of appeals upon its motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Consent of the Notice of Appeal. A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

Rule 4. Appeal as of Right - When Taken

(a) Appeal in a Civil Case. -

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law

as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 27. Motions

(a) Content of Motions; Response. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the

provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise

shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an actin: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims as interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claims or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its

discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(2)

Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

No. 95-1950

In the Supreme Court of the United States

OCTOBER TERM, 1995

HERBERT W. DUNMEYER, ET AL.,
PETITIONERS,

v.

BECTON DICKINSON AND COMPANY,
RESPONDENT.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

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Rule 29.6 List of Parent or Subsidiary Corporations

Respondent Becton Dickinson and Company has no parent company. Becton Dickinson and Company owns minority interests in Oncogene Sciences, Inc., Lynx Therapeutics, Inc., and Medi-Ject Corp.

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In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1950

HERBERT W. DUNMEYER, ET AL.,
PETITIONERS,

v.

BECTON DICKINSON AND COMPANY,
RESPONDENT.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

Lack of appellate jurisdiction. This Court cannot properly exercise jurisdiction over the appeal of which petitioners seek review here. The notice that initiated petitioners' appeal was filed on June 7, 1994, some three-and-a-half months before entry of the final order, and encompassed six interlocutory orders. (*See* B-1-4.) On respondent's motion, the Court of Appeals for the Ninth Circuit limited the scope of the appeal by dismissing all but one of the interlocutory orders, for lack of jurisdiction under 28 U.S.C. § 1292 and because the notice of appeal had not been timely filed with respect to those orders. (A-11-12.) The one order that remained before the court of

appeals was a May 11, 1994 order denying motions to intervene. On September 23, 1994, following a settlement of plaintiff's claims against respondent, the district court entered a final order of vacatur and dismissal, rendering the appeal of the orders denying intervention moot.[1] (C-39-40.) Petitioners filed no notice of appeal following the entry of the district court's final order and thus waived any right of appeal from the prior interlocutory orders. Accordingly, although the petition to this Court was timely under Supreme Court Rule 13, there is no basis for this Court's jurisdiction.

Lack of subject matter jurisdiction in the district court. The district court originally exercised jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff's sole federal claim alleged violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. This claim lacked several essential elements required under the Act, and in 1992, the district court entered partial summary judgment dismissing it as a matter of law. Thereafter, the court purported to exercise supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367. Section 1367, however, applies only to civil actions commenced after December 1990, and supplemental jurisdiction would not in any event be available in the absence of a good faith basis for the claim on which original jurisdiction was predicated. The district court declined to determine whether it had diversity jurisdiction over the claims of the class members, which it plainly did not, since most of the claims failed to meet the jurisdictional amount. (Many of the claims were for less than $1,000, and some were as small as $4 or $5.) Following decertification of the class, the Dunmeyer group of petitioners moved to intervene as parties plaintiff. The district court denied their motion in part because "the complaints in intervention fail to allege facts showing an independent basis for jurisdiction." (C-28.)

[1] Because of this settlement, plaintiff was not a party in the court of appeals and is not a party before this Court.

STATEMENT OF THE CASE

Proceedings Below

Plaintiff David Koepke brought this action in August, 1988, purporting to represent a class of field sales representatives employed by the Becton-Dickinson Division of respondent Becton Dickinson and Company ("BD"). As amended, the complaint alleged that BD underpaid its field sales representatives, including petitioners, under the terms of incentive compensation plans in effect during fiscal years 1978 to 1981. Plaintiff claimed that these alleged underpayments constituted breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith denial of the existence of contract, negligence, conversion, breach of fiduciary duty, violations of the California Labor Code, negligent misrepresentation, fraudulent inducement, fraud, and violations of the RICO Act.

In 1991, the district court provisionally certified a class encompassing all field sales representatives employed by BD throughout the nation in BD's fiscal years 1978 through 1981. After approximately fifty percent of the class accepted court-approved offers of settlement from BD, the class included members whose claims arose in some thirty-four different states.

In 1992, BD moved for partial summary judgment on plaintiff's RICO claim on the ground that it lacked any legal basis. The court granted the motion, eliminating the sole federal question from the case.

In 1993, BD moved to decertify the class, pointing out that, under California choice of law principles, the district court would need to apply the conflicting laws of thirty-four different jurisdictions to the ten remaining state law causes of action. BD argued that the need to do so would make the action unmanageable in class form. By order dated August 18, 1993, the court granted BD's motion. (C-16-17.) Applying California's "governmental interest" test, the court deter-

mined that the laws of the class members' states of residence applied to their state law claims. The court also found that "factual as well as legal differences exist which would make trial of this case as a class action unmanageable," and decertified the class.

Plaintiff twice sought to revisit the decertification issue. He filed a motion for reconsideration, which was denied after full briefing and argument (C-18-19), and then a motion to "recertify" the original class based on an entirely new choice of law theory. This, too, was denied after full briefing and argument. (C-22-23.)

On February 1, 1994, the district court issued a notice of decertification to the former class members, informing them, among other things, that "as a result of the Court's rulings, you are no longer a class member in this lawsuit . . . ." The notice further informed its recipients of their right to file their own lawsuits or to move to intervene as parties plaintiff or for purposes of appeal.

In March, 1994, seven former class members (Forster, Jones, Oravetz, Peckels, White, Williams, and Zucht), each represented by James Thomas, plaintiff's attorney, moved to intervene for purposes of appeal. BD did not oppose their request for intervention for purposes of appeal.

At the same time, eight former class members (Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret, and Procalo), each of them likewise represented by plaintiff's attorney, moved pursuant to Fed. R. Civ. P. 24 to intervene as parties plaintiff. On May 11, 1994, the district court denied the motion. (C-28-29.) As to intervention of right, the court ruled that the intervenors failed to show (1) that their interests would be impaired or impeded if their claims were not adjudicated in the pending action and (2) that plaintiff would not adequately represent their interests. As to permissive intervention, the court ruled in the exercise of its discretion that intervention would prejudice the existing parties and delay resolution of the case.

On June 7, 1994, while plaintiff's case was proceeding to

trial, plaintiff's counsel filed a notice of appeal from seven interlocutory orders of the court on behalf of the fifteen former class members who had sought intervention either for purposes of trial or for purposes of appeal and who are the petitioners before this Court. The notice (B-1-4) covered the following orders, among others:

> 1. The August 18, 1993 order granting BD's motion to decertify the class;
>
> 2. The September 20, 1993 order denying plaintiff's motion for reconsideration of class decertification;
>
> 3. The January 18, 1994 orders denying plaintiff's motion for "recertification" and denying plaintiff's related motion for partial summary judgment concerning choice of law for the proposed "recertified" class; and
>
> 4. The May 11, 1994 order denying the motions of Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret and Procalo to intervene as parties plaintiff.

After the appeal was docketed in the court of appeals, BD moved to dismiss it with respect to all but the last of these interlocutory orders for lack of appellate jurisdiction. On September 16, 1994, the court of appeals granted BD's motion. (A-11-12.) With respect to the first three orders listed above, the court held that (i) none of them was final or immediately appealable, since no final judgment had been entered in the case; and (ii) the appeal was not timely filed under Fed. R. App. P. 4(a)(1) with respect to the three orders. *Id.* The court of appeals thus limited the scope of the appeal to the May 11 order denying intervention.

During the pendency of the interlocutory appeal, the case was selected for inclusion in the Ninth Circuit's mediation program. With the assistance of the mediator, plaintiff and BD achieved a settlement in principle on September 15, 1994. The settlement was conditioned on the district court's entry of an order of vacatur and dismissal.

On September 16, 1994, counsel for the parties (including Mr. Thomas) appeared at a scheduled final pretrial conference, announced the settlement to the trial judge, and dis-

cussed with him the reasons for and implications of vacatur. After briefing on the issue, the judge entered an order of vacatur and dismissal.[2] (C-39-40.)

Petitioners did not file a notice of appeal within thirty days after the final order or at any time thereafter, despite the explicit requirements of Fed. R. App. P. 4. On October 13, 1994, however, petitioners' counsel filed a motion to "expand" the pending interlocutory appeal of the intervention order to encompass additional interlocutory orders and to include review of the final order of vacatur and dismissal itself. (B-5-10.) BD opposed petitioners' motion, which was denied without prejudice, thus deferring the issue for consideration by the full panel. (A-10.)

The court of appeals affirmed the orders of the district court, ruling that the denial of intervention was proper and that it lacked jurisdiction to rule on any other aspects of petitioners' appeal due to their failure to file a notice of appeal after entry of the final order. (A-3-9.) On the latter point, the court of appeals found that petitioners' "motion to expand" their appeal was "not a notice of appeal or the 'functional equivalent' of a notice of appeal." (A-9.)

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[2] In view of Mr. Thomas' participation in the Ninth Circuit mediation and his appearance before the district court to announce the settlement, the assertion in the petition (at p. 9) that the order of vacatur was entered in the absence of petitioners' counsel grossly misstates the facts. Moreover, petitioners' counsel comes before this Court seeking to overturn the very order to which his client assented and upon which the settlement was conditioned. His effort to upset the fundamental premise of a settlement entered into by one client — in which his firm participated financially — in order to advance the supposed interests of other clients is a clear conflict of interest and creates a substantial appearance of impropriety. Counsel's conflict of interest is academic, however, in view of the fact that he failed to file a notice of appeal from the order of vacatur and dismissal and thus, as discussed below, the order is not properly before this Court.

Statement of Facts

Although the issues on appeal are entirely procedural, the petition so distorts the factual background of the case as to require a brief response.[3]

Becton Dickinson and Company is a New Jersey corporation headquartered in New Jersey. It manufactures and sells medical supplies and diagnostic systems for use by health care professionals. During the 1978-81 period, members of the BD sales force who were eligible received, in addition to a fixed salary, payment of incentive compensation.

In each of the four years, BD sent a written description of the applicable provisions of the incentive compensation plan then in effect to the members of its nationwide sales force. The terms of the plans varied from year to year. Each plan contained a formula for making a year-end calculation of the amount of incentive compensation potentially available for distribution on a region by region basis, an amount sometimes referred to as the "regional bonus pool." The bonus formula was stated as a percentage of the region's increase in sales over the prior year plus, if BD exceeded its national sales budget, an additional percentage of the region's sales in excess of budget. *See, e.g.*, C-10-12.

In reciting this bonus formula in their "factual background," petitioners omit mention of the fact that, under the express terms of the plan, the bonus formula was subject to adjustment by BD. The plan sent to field sales representatives in 1979, for example, stated:

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[3] Without detailing each of petitioners' misstatements, BD notes that petitioners assert as truth matters that were merely alleged and that BD categorically denied. Some of the assertions attributed to "BD" or "BD management" are allegations made by a single member of the decertified class, allegations that were denied by BD and that, in any event, pertained to disputed conversations between two individuals. Other statements attributed to "BD management" are taken out of context from individuals who played no role in, and had no knowledge of, management's implementation of the incentive compensation plan.

> B-D Division reserves the right to make adjustments in the above formula in cases of windfall volume, adverse economic factors, or new product sales.

(C-11, ¶ 6.) Similar language appeared in the 1978, 1980, and 1981 plans. Petitioners' claims that they had a legal right to be paid incentive compensation over and above what they received completely ignore this explicit right to adjust the bonus formula.

The evidence, including the sworn testimony and records of the individuals responsible for implementing the plans in the 1978-81 time period, shows BD's compliance with the provisions of the plans in each of the four years in question.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION CONCERNING THE EFFECT OF PETITIONERS' FAILURE TO FILE A NOTICE OF APPEAL DOES NOT WARRANT SUPREME COURT REVIEW.

Petitioners urge this Court to review the question whether the "motion to expand review" they filed in the court of appeals was the "functional equivalent" of a notice of appeal under *Smith* v. *Barry*, 502 U.S. 244 (1992). In *Smith* v. *Barry*, this Court held that a *pro se* prisoner's "informal brief" (a court-generated form sent to *pro se* appellants) was the "functional equivalent" of a notice of appeal and was therefore sufficient to create appellate jurisdiction.

In this case, the court of appeals held that the "motion to expand review" filed by petitioners following the entry of final judgment was "insufficient," since it was neither a notice of appeal nor "the 'functional equivalent' of a notice of appeal." (A-9.) Accordingly, the court of appeals declined to review the several orders cited in petitioners' motion.[4]

[4] This ruling did not affect the court's review of the order denying intervention, as to which petitioners had filed a proper and timely notice of appeal.

Contrary to petitioners' argument, the Ninth Circuit's decision does not *conflict* with *Smith* v. *Barry*, it *applies* it. *See id.*, 502 U.S. at 248. That application was correct. Petitioners filed a motion, not a notice. The motion required a responsive filing by BD, as a notice does not. It did not express a clear intent to pursue an appeal. In contrast to a notice of appeal, the motion argued that appellate review would be *appropriate*, but left it to the court of appeals to decide the scope of the appeal. Lastly, by virtue of the fact that the motion sought to "expand" a prior, pending appeal, it sought to consolidate review of six interlocutory orders with review of the issues raised in the prior appeal, a different result from what would have ensued had petitioners filed a notice of appeal following the entry of the district court's final order. Had they done so, petitioners' second appeal would have required a new filing fee, proceeded along a different briefing schedule, and (in the absence of court-ordered consolidation) been scheduled for argument at a later time.[5]

Even if the court of appeals' application of *Smith* v. *Barry* to the peculiar circumstances of this case were erroneous, that alone would not justify the grant of certiorari. The question petitioners present to this Court is unique and non-recurring,

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[5] Petitioners further argue that the decison below conflicts with *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991). In *FirsTier*, this Court held that, under Fed. R. App. P. 4(a)(2), a prematurely filed notice of appeal from an order that the appellant "reasonably but mistakenly believes to be a final judgment" (498 U.S. at 276) ripens into an effective notice of appeal from the final judgment, once entered. *Id.* at 275. In so ruling, this Court cautioned, "This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision . . . to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable." *Id.* at 276 (emphasis in original). Petitioners could not reasonably have believed that the interlocutory orders that they had sought to appeal on June 6, 1994 were final orders, particularly since the court of appeals, in its order of September 16, 1994, had ruled that they were not. *FirsTier* confirms that petitioners' expansive interpretation of Rule 4, which essentially would make the filing of a notice of appeal after entry of judgment optional, is not the law.

arising out of petitioners' novel approach to the appellate rules. It is highly unlikely that the courts of appeals are frequently, if ever, confronted with the question whether a motion to "expand review" of an interlocutory appeal can substitute for the filing of a notice of appeal of a later final judgment. (Neither party turned up any case involving facts resembling these in their several briefs on this issue below.)

Were the Court to expend its scarce resources on answering this question, its decision would affect no one but the litigants in this case. This Court has observed that it does not "sit for the benefit of the particular litigants" and generally does not expend its resources on problems of an "academic or episodic" nature. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). In short, this case does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), and thus is not worthy of further review.

II. THE DISTRICT COURT'S DECERTIFICATION AND CHOICE OF LAW RULINGS ARE NOT PROPERLY BEFORE THE COURT AND DO NOT WARRANT REVIEW.

The second question petitioners present for review is whether the district court erred in decertifying a nationwide class action after finding that the class members' ten state-law causes of action would be governed by the conflicting laws of thirty-four different jurisdictions. This issue was not even reviewed in the court of appeals, and in any event raises no federal question.

Because petitioners failed to file a timely notice of appeal of the district court's decertification order, the Ninth Circuit never reached or reviewed the issue. In asking this Court to reach down to the district court level to review the decertification order, petitioners ignore this Court's often expressed unwillingness to review matters not considered in the court

of appeals. This unwillingness has prevailed even when a court of appeals' failure to reach an issue is the result of an error by the court of appeals concerning the proper scope of the appeal. *See, e.g., Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479, 481 (1976) (per curiam) (declining to reach merits of petitioner's choice of law argument because the court of appeals had not passed on the issue); *cf. Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 75 n.2 (1973) (ruling that an issue that was an alternative ground for district court's decision but not reached in the court of appeals was "not before this Court").

Further, the issue petitioners would have the Court review turns entirely on the district court's application of *state law*, specifically California's choice of law rules. *See Bernhard* v. *Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (in bank), *cert. denied*, 429 U.S. 859 (1976). Based on its application of these state law rules, the district court concluded that the conflicting laws of the thirty-four states in which class members resided would govern their multiple state-law claims, thereby rendering a class action unmanageable. The court's decision is singularly inappropriate for Supreme Court review, since a ruling on the application of California choice of law rules would involve no federal question at all. *See, e.g., Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted where "the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance").[6]

Petitioners' attempt to create a federal question where none exists is incoherent. Petitioners argue that since, as a matter of constitutional law, this Court has *permitted* application of one state's laws in multistate diversity class actions in certain circumstances, such an outcome is constitutionally *required* here.

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[6] No question regarding the interpretation or application of Fed. R. Civ. P. 23 is is raised here; petitioners have never disputed that a class action in which multiple states' laws must be applied is unmanageable under Fed. R. Civ. P. 23. *See, e.g.*, Petition, pp. 15-16.

While the Constitution does place some limitations on a forum state's application of its own law to non-resident class members, so as to ensure that the uniform application of that law to the claim of each class member is "neither arbitrary nor fundamentally unfair," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985), (quoting *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 312-13 (1981)), the Constitution does not dictate a state's choice of law rules. If, as a matter of state law, California chooses to apply the laws of the class members' states of residence, there is nothing in the Constitution that forbids it from doing so. For petitioners to claim that the district court's choice of law ruling somehow violates *Shutts* or *Sun Oil* v. *Wortman*, 486 U.S. 717 (1988) (permitting uniform application of one state's statute of limitations to a multistate class action) is inexplicable. The question petitioners ask this Court to review involves merely the application of California state law to a particular set of facts presented to the district court. This is scarcely a matter that warrants the attention of this Court.

III. THE PROPRIETY OF THE DISTRICT COURT'S VACATUR ORDER IS NOT PROPERLY BEFORE THE COURT AND IS UNWORTHY OF THE COURT'S ATTENTION.

The third issue petitioners present for review is the propriety of the district court's vacatur order, which was entered in connection with the settlement between BD and plaintiff. This issue is not worthy of review by this Court. As an initial matter, due to petitioners' failure to file a notice of appeal, the Ninth Circuit never reached the issue, so there is no court of appeals decision to review.

Nonetheless, petitioners argue that the Court should reach down to the district court to correct asserted error. According to petitioners, the district court lacked jurisdiction to enter a vacatur order, and its order conflicts with cases in this Court and the Sixth and Eighth Circuits. These arguments are factu-

ally and legally erroneous.

The gist of petitioners' jurisdiction argument is that, due to petitioners' then pending interlocutory appeal in the Ninth Circuit, the district court was without jurisdiction to vacate its own prior interlocutory orders. At the time the district court entered its order of vacatur and dismissal on September 23, 1994 (*see* C-39-40), however, the Ninth Circuit had already, by an order dated September 16, 1994, limited the scope of petitioners' interlocutory appeal to the intervention issues only. (A-11-12.) Petitioners evidently contend that any time a district court denies a motion to intervene and the intervenor appeals, the court is divested of jurisdiction to modify or vacate prior interlocutory orders, notwithstanding the explicit provision in Fed. R. Civ. P. 54(b) that an interlocutory order is "subject to revision at any time before the entry of [final] judgment."

There is no merit to this argument, and there is no conflict with *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam); *Fort Gratiot* v. *Michigan Department of Natural Resources*, 71 F.3d 1197 (6th Cir. 1995); or *Liddell* v. *Board of Education*, 73 F.3d 819 (8th Cir. 1996), cited by petitioners. These cases all stand for the unexceptional proposition that when a case is on appeal, the district court will not exercise jurisdiction over the case except in aid of the appeal. These cases do not address what occurs when an interlocutory appeal is taken. They certainly do not hold that an interlocutory appeal brings all matters in the district court to a standstill, which, as a matter of settled law, it does not. *See generally* 9 Moore's Federal Practice ¶ 203.11 at 3-54-55 (1996).

Petitioners further argue that the vacatur contravened this Court's ruling in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994). They are wrong. To begin, *U.S. Bancorp* concerned vacatur of a final judgment. The district court here did not vacate a final judgment; it merely vacated its interlocutory orders, as permitted under Fed. R. Civ. P. 54(b).

Moreover, before vacating the interlocutory orders, the district court, in an abundance of caution, applied the Ninth Circuit standard for vacatur of final judgments. *See Bates* v. *Union Oil Co.*, 944 F.2d 647, 650 (9th Cir. 1991) (quoting *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)), *cert. denied*, 503 U.S. 1005 (1992). The district court duly applied the *Bates/Ringsby* standards, considering the competing values of "finality of judgment and right to relitigation of unreviewed disputes." (C-39.) Among other things, the district court considered the fact that there was no "interest in finality" here, because there had been no final judgment. Further, there was a strong interest in permitting relitigation of the issues because the parties had come to a settlement *prior to trial*. The vacatur of all interlocutory orders was a condition of settlement. Had the district court not vacated the orders, the parties would have been put to the burden and expense of a trial and an appeal in a case they both wished to settle.

The balancing inquiry conducted by the district court judge under the *Bates/Ringsby* standard is entirely consistent with, and, in fact, exemplifies the principles governing vacatur set forth in *U.S. Bancorp*. In *U.S. Bancorp*, this Court concluded that when a case settles during the pendency of an appeal of a final judgment, (1) vacatur of the judgment below should not be automatic, but should instead result from a determination that vacatur is appropriate in the circumstances of the case; and (2) the balancing of competing considerations required to determine the appropriateness of vacatur is best done by the district court, not an appellate court. *U.S. Bancorp*, 115 S. Ct. at 393. To the extent that it was even necessary, given the fact that no judgment had entered, the district court's careful application of the *Bates/Ringsby* standard here was a textbook example of a vacatur meeting all of the conditions set forth in *U.S. Bancorp*.

IV. THE DENIAL OF INTERVENTION IMPLICATES NO CONFLICT BETWEEN THE CIRCUITS AND IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW.

Petitioners, lastly, ask this Court to review the Ninth Circuit's ruling that the district court properly denied their motions to intervene as of right. This issue does not warrant a writ of certiorari.

A. *The Issue of Intervention is Moot, And Any Decision in Petitioners' Favor Would Have No Practical Effect in Any Event.*

Mootness. As a matter of Ninth Circuit law, the issue of intervention was rendered moot by the settlement of the underlying action. *See United States* v. *Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) (dismissing as moot appeal of denial of motion to intervene because "there is no proceeding in which appellants can intervene"), *cert. denied sub nom. Midwest Growers Cooperative* v. *United States*, 455 U.S. 942 (1982). Were this Court to rule that the denial of intervention was improper, the Ninth Circuit, upon remand, would simply dismiss the matter as moot. For this reason, as to the intervention issue, the petition for certiorari itself should be dismissed as moot.

No practical effect. When the district court denied intervention as of right, it held that petitioners had failed to show *either* (1) that their interests would be "impair[ed] or impede[d]" in the absence of intervention, *or* (2) that plaintiff would not adequately represent their interests. The Ninth Circuit affirmed the district court's ruling on the "impair or impede" test and thus found it unnecessary to address the adequacy of representation issue. Since petitioners had the burden of meeting both tests, even if this Court ruled in favor of petitioners on the narrow issue they present, this Court's decision would have no practical effect even if the Ninth Cir-

cuit for some reason declined to dismiss the matter as moot. The Ninth Circuit would simply consider the district court's ruling that there was no right of intervention because plaintiff adequately represented petitioners' interests. Given that petitioners were represented by the same attorney representing plaintiff and asserted exactly the same arguments as those that were being pressed by plaintiff at the time of the ruling, it is highly unlikely that the court of appeals would disturb the district court's order. *See Blake* v. *Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977); *Union Central Life Insurance Co.* v. *Hamilton Steel Products, Inc.*, 374 F.2d 820, 823 (7th Cir. 1967).

B. *The Ninth Circuit's Decision Does Not Conflict with Decisions in Other Circuits.*

The court of appeals rejected petitioners' argument that denial of intervention "impaired or impeded" their interests within the meaning of Rule 24(a). It did so on the ground that petitioners had not shown "how [their] interests would be hurt by bringing separate suits" (A-7), which they were then and are still free to do. The court further held:

> [Petitioners] argue[] that courts must allow intervention even if the applicant could simply file another action but would suffer inconvenience and waste effort as a result. Our precedent rejects this position. "Mere inconvenience" or supposed judicial economy considerations are not enough to mandate intervention as of right.

(A-6-7.) This eminently reasonable conclusion is consistent with the rulings of other circuits. Moreover, the decisions from other circuits that supposedly give rise to the conflict with the Ninth Circuit were rendered in the 1960's and 1970's. Thus, the asserted conflict is of doubtful urgency.

District of Columbia Circuit. Petitioners cite *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir.

1977) ("*NRDC*") and *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), to support their claim of conflict between the Ninth and District of Columbia circuits. On their facts, however, both of these cases closely resemble cases in which the Ninth Circuit, too, has held that a party was entitled to intervene as of right. In both *NRDC* and *Nuesse*, the proposed intervenors' interests would have been severely impaired had they been forced to bring separate suits.

In *NRDC*, various corporations sought intervention in order to participate in rulemaking proceedings required by a proposed settlement that would regulate their industries. In these circumstances, the alternative of a later challenge to the regulations promulgated as a result of the settlement would pose far more than mere inconvenience. In *Nuesse*, a state banking commissioner sought intervention in a case of first impression that would critically affect the banks within the commissioner's jurisdiction and control. Had the commissioner been excluded, he might later have had to bring a new proceeding to undo what had been done in the initial action.

These cases are similar to Ninth Circuit cases such as *United States* v. *Stringfellow*, 783 F.2d 821 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987), in which the Ninth Circuit *approved* intervention of right. In *Stringfellow*, the Ninth Circuit ruled that neighbors of a hazardous waste site could intervene as of right in order to participate in the adjudication of a remedial plan for the site.

In all of these cases, something substantially more than the inconvenience of having to file a new suit was at stake. No case from either circuit stands for the proposition that the mere burden of initiating a new lawsuit is sufficient to meet the "impair or impede" test. If petitioners' position were correct, it would be easier to intervene as of right than to intervene permissively.

Fifth Circuit. Petitioners cite *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied sub nom. Trefina* v. *United States*, 400 U.S. 878 (1970), to show that the Fifth Circuit's intervention standard is in conflict with the

standard applied below. Petitioners neglect to mention that since *Diaz* — which would not support intervention in the context of this case in any event — the Fifth Circuit has clarified its intervention standard. In *United States* v. *Texas Eastern Transmission Corp.*, 923 F.2d 410 (5th Cir. 1991), the court ruled that the commonwealth of Pennsylvania could *not* intervene as of right in a suit filed by the Environmental Protection Agency against the operator of a gas pipeline that passed through Pennsylvania, despite the obvious impact that the proposed settlement of the action would have on Pennsylvania. *Texas Eastern* does not support petitioners' assertion that the Fifth Circuit applies a more lenient standard to intervention as of right than does the Ninth Circuit.

In the end, the supposed differences among the courts of appeals are merely semantic and reflect the peculiar facts of each case. *See generally Miroyan* v. *United States*, 439 U.S. 1338, 1343 (1978) (Opinion in Chambers, Rehnquist, J.) (noting that, even where an inter-circuit conflict is identifiable, "the Court is not likely to grant certiorari in [the] case unless such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists"). Petitioners have not pointed to any decision in which one circuit has identified a difference between its standard and the standard applied in another circuit. Nor have petitioners pointed to a decision in *any* circuit court of appeals granting intervention as of right on facts similar to those here.

This case does not involve the sort of "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" that prompts this Court to grant the writ of certiorari. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ of certiorari on the ground that the assertedly conflicting decisions of the courts of appeals "were really in harmony and not in conflict"). Petitioners' rhetoric about "flexibility" and "judicial efficiency" is inadequate to show any conflict between the circuits or any other reason for this Court to review the intervention issue.

CONCLUSION

For the foregoing reasons, respondent Becton Dickinson and Company respectfully requests that this Court deny the Joint Petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-1950

IN THE

Supreme Court of the United States

October Term, 1995

HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRET, ERNEST R. PROCALO, RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II,

Joint Petitioners

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS REPLY TO BRIEF IN OPPOSITION

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Joint Petitioners

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Respondent.

PETITIONERS REPLY TO BRIEF IN OPPOSITION

In common parlance, Becton Dickinson just does not seem to get it. One would assume after having been assessed over $27,000 in terms (CR 211 at 1, 3) in this matter, and now being before the nation's highest court, Becton Dickinson would fairly discuss the issues presented rather than continue its lowest common denominator approach by making statements totally unsupported by the record, and by

attempting to obfuscate rather than convince. Such a strategy, however, cannot mask the flaws in its opposition to the granting of the Writ of Certiorari.

I. No Second Notice of Appeal Required of Litigants Already Before Ninth Circuit

In opposing the granting of the Writ on the second notice of appeal issue, and ignoring (1) the notice actually afforded to Becton Dickinson ("BD"), (2) the "ripening" of the initial June 1994 Notice of Joint Appeal, and (3) the specific request for review of particular trial court orders made in October, 1994 (see Appendix B-9), the point in BD's fundamental form-over-substance position is the October 1994 FRAP 27 Motion to Expand Review was different from a Notice. The fact is, however, that given this Court's pronouncement in Smith v. Barry, 502 U.S. 244, 247-48, 112 S. Ct. 678, 681 (1992), that "notice afforded by [a] document" that sets out the "parties taking the appeal", the particular "order or part thereof appealed from", and names the "court to which the appeal is taken", satisfies FRAP 3 and

4. Whether a party requests the Court of Appeals to review specific trial court orders in a document entitled a "notice", or in a document entitled a "Motion" from parties already before that Court of Appeals, is not material. The critical factor is the "notice afforded" in the document[1], not its title.

Here, BD has not, and cannot contend it was not specifically given notice of precisely the orders petitioners were seeking the Court of Appeals to review. The initial Notice of Joint Appeal (Appendix B-1 - B-4) and the specific, timely request by petitioners that the Ninth Circuit review "include the following orders" listed in its FRAP 27 Motion (Appendix B-9) gave all the notice FRAP 3 and 4 contemplated. Nothing more was required.

[1] See Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 618 (9th Cir. 1993)("opening brief satisfied the requirements of Rule 3"); see also Intercargo Ins. Co. v. United States, 83 F.3d 391, 395 (Fed. Cir. 1996) where Federal Circuit endorsed the stance that variations in the "wording of the notice of appeal are generally overlooked if the true intentions of the appellant can fairly be ascertained, if the courts have not been misled, and if the other parties have suffered no prejudice;" Stuart v. United States, 23 F.3d 1483, 1485 (9th Cir. 1994) (Court has "power to permit a party to amend a notice of appeal even without a formal motion").

BD's final aside that, in any event, the "unique and non-recurring" insistence of the Ninth Circuit on a second Notice of Appeal "is not worthy of further review," sidesteps both this Court's desire for consistent application of the FRAP, and the ongoing practical realities of litigation, where every day some trial court orders are final as to some parties[2], though interlocutory as to others.

Joint Petitioners respectfully submit that this Court's taking review of this matter, and making it clear that parties already before a circuit court, who gave notice of orders they wished reviewed, need not file a second notice of appeal as issues ripen, will prevent appeals from degenerating into the Byzantine treatment of appeals advocated by BD. Under such a reading of the FRAP, if left uncorrected, appeals with merit will time and again be left to drown in a mercurial sea

[2] As this Court recognized in Quackenbush v. Allstate Ins. Co., ___ U.S. ___, 116 S.Ct. 1712, 1719 (1996), when a trial court order "puts the litigants ... 'effectively out of court'," they can appeal rulings contrary to them. At a minimum then, the Dunmeyer intervenors, no longer class members, denied intervention individually and "out of court," were free to appeal each of the seven orders they timely requested be reviewed.

of rulings and court rules that purport to mean what they say but do not say what they mean -- a result that in and of itself flies in the face of this Court's support of simplifying the FRAP to make them "more easily understood". See 116 S. Ct. CCXVII.

II. FRCP 23 Cannot Be Nullified by False Conflicts

In opposing this Court's taking review of the issue pertaining to the continued efficacy of FRCP 23, BD appears to contend this Court does not have jurisdiction over that issue, and asserts there is "no federal question" here despite the focus on the practical functioning of FRCP 23. These assertions must be rejected.

First, this Court has jurisdiction to review issues from "[c]ases in the courts of appeal" whether or not they were interlocutory, whether they were ruled on or not, and "before or after rendition of judgment or decree ..." 28 U.S.C. § 1254(1); Nixon v. Fitzgerald, 457 U.S. 731, 742-44, 102 S. Ct. 2690, 2697-98 (1982); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488 n.6, 88 S. Ct. 2224,

2228-29 n.6 (1968); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58, 36 S. Ct. 269, 271 (1960)(Court can "rectify any error that may have occurred in the interlocutory proceedings").

Second, as recognized in this Court, class actions under FRCP 23 create an avenue for "justice to the lowly as well as those liberally endowed with power and wealth". Eisen v. Carlisle & Jacqulin, 417 U.S. 156, 186, 94 S. Ct. 2140, 2156 (1974). Certainly the proper functioning of FRCP 23 and its continued utility in the federal courts on a multi-state basis is every bit as "important" to this Court as the functions of FRCP 26-37. See Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385 (1947). With wrongs perpetrated on citizens residing in various states[3] an unfortunate yet

[3] Such multi-state wrongs, recognized as a matter of law, occurred here. Flatly rejecting BD's specious assertions it could unilaterally and secretly change the contractual "mathematical calculation" by which bonus monies "accrued" for the FSReps, and reminding BD it had stipulated it breached its incentive compensation plan, the trial court prior to decertification granted the Class' motion, specifically noted as a matter of law BD had been "skimming the bonus pool for payments to management", and ruled under California law BD

recurring reality today, were this Court not to accept review of this issue, FRCP 23 will be left to be relegated to apply solely to single-state wrongs. It was not drafted to function in such a limited fashion. The definition pressed by BD and others, however, would achieve precisely that result if multi-state FRCP 23 classes could be nullified by the mere assertion that other states' laws differ, even though a different result is not mandated by those states' laws. Such a mere assertion is no substitute for the necessary analysis. Nor can false conflicts be allowed to eliminate FRCP 23's effectiveness. Joint Petitioners submit review by this Court on this issue can prevent that unanticipated and uncalled for erosion of FRCP 23.

III. Due Process Clause Does Not Permit Trial Court to Vacate Rulings Favorable to Litigants On Appeal No Longer Before It

Without describing at this time BD's failure to comply

was guilty of "conversion" here for "skimming" that money from its FSReps residing in a ten-state region. CR 333/RT (6/6/91) at 15.

with the Bates/Ringsby standards it gave mere lip service, Joint Petitioners submit its failure to explain (1) how it was that the "out of court" Dunmeyer intervenors could concededly appeal the intervention issue but no other orders final as to them, or (2) how it could, in settling with Mr. Koepke and his local counsel,[4] proceed to vacate rulings favorable to the former class members' cases who were on appeal, in the absence of those individuals and their attorney, is fatal to its opposition. Vacating rulings and stipulations pertaining solely as to Mr. Koepke was one thing. Vacatur contrary to established precedent and the Due Process Clause of the Fifth Amendment, as it involved "out of court"

[4] BD's disingenuous attempt to implicate petitioners' counsel in the settlement it negotiated solely with former class representative Koepke's local counsel, Bruce L. Shaffer, by virtue of petitioners' counsel (lead Koepke trial counsel) attending the final Pretrial Conference prior to the case ever settling (CR 874), is beneath the dignity of this Court. BD never presented petitioners nor their counsel with any authority for the vacatur of rulings favorable to the petitioners (already "out of court" and on appeal to the 9th Circuit), and never presented them or their counsel with so much as a copy of any motion or proposed vacatur order. (Appendix C-35 - 38). No truthful, ethical statement to the contrary can be made. The record confirming those facts is eminently clear.

individuals on appeal, is quite another. Review by this Court of increasing attempts by repeat litigators to obtain vacatur would prevent degradation of the federal courts.

IV. Disjunctive "Impede" Test Cannot Be Interpreted Out of FRCP 24

BD's efforts to block this Court's review by claiming mootness or citing the Texas Eastern Fifth Circuit "impairment" case that actually endorsed the "impede" factor in Diaz relied upon petitioners, is equally unavailing. This Court has rejected the defense strategy of "picking off" named plaintiffs then claiming mootness. See Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 339-40, 1--S.Ct. 1166, 1174-75 (1980); cf. United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. 2464 (1977). Further, BD's irresponsible assertion in opposing review of the FRCP 24(a) "impede"issue that the trial court ruled it lacked jurisdiction to consider FRCP 24(b) issues (when the trial court prior to ruling assumed "I have jurisdiction" - CR 828/RT (4/29/94) at 12) exhibits desperation, not merit.

Review by this Court of the "impede" issue would aid the lower courts by avoiding a bend to duplicitous litigation back toward resolving matters in a single existing case.

CONCLUSION

Joint Petitioners respectfully submit predictable and consistent applications of functional federal rules of appellate and civil procedure are the cornerstones of the federal circuit and district courts. Review by this Court of the important procedural and improper vacatur questions presented further this Court's goals.

Respectfully submitted this 18th day of July, 1996,

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